

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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: **FEB 09 2012** Office: TEXAS SERVICE CENTER

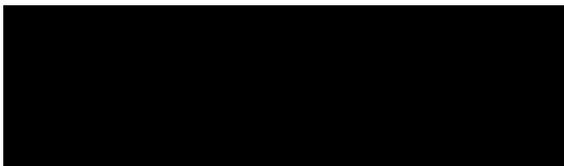


IN RE:



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,

Elizabeth McCormack

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 petitioner is a lock and safe service company. It seeks to employ the beneficiary permanently in the United States as a locksmith, DOT job code 709.281-010 (locksmith or lock expert). 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 denied the petition, finding that the petitioner had failed to establish the continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

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 18, 2008 decision, the single 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.

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

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.

With respect to the ability to pay, 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

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).

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).

In the instant proceeding, the Form ETA 750 was filed for processing and accepted by the DOL on June 14, 2004. The rate of pay or the proffered wage specified on the Form ETA 750 is \$18.95 per hour or \$39,416 per year (based on a 40-hour work per week).

To show that the petitioner has the continuing ability to pay \$18.95 per hour or \$39,416 per year from June 14, 2004, the petitioner submitted the following evidence:

- Copies of Forms 1120-A, U.S Corporation Short-Form Income Tax Return, for tax years 2004 and 2005, and
- Copies of the beneficiary's Forms W-2, Wage and Tax Statement, for the years 1999 through 2007.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year in 2004 and 2005 began on July 1 and ended on June 30. On the petition, the petitioner claimed to have been established in July 1974 and to currently employ six people. On the Form ETA 750B, signed by the beneficiary on June 7, 2004, the beneficiary claimed to have worked for the petitioner as a locksmith assistant since December 1999.

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 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.

In this case, the beneficiary, based on the evidence submitted, has been continuously employed and paid by the petitioner since 1999.² The beneficiary received the following wages from the petitioner between 2004 and 2007:

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2004	\$36,189.70	\$39,416	(\$3,226.30)
2005	\$37,044.90	\$39,416	(\$2,371.10)
2006	\$40,674.29	\$39,416	Exceeds the PW
2007	\$42,390.07	\$39,416	Exceeds the PW

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay \$3,226.30 in 2004³ and \$2,371.10 in 2005. The petitioner can show the ability to pay those amounts through either its net income or net current assets.

If the petitioner chooses to use its net income to demonstrate the ability to pay, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

² The AAO will only evaluate and consider the wages that the beneficiary received from the priority date. As noted above, 8 C.F.R. § 204.5(g)(2) only requires the petitioner to demonstrate the ability to pay from the priority date.

³ The director determined in his decision dated April 18, 2008 that the wages paid to the beneficiary in the amount of \$36,189.70 for 2004 established the petitioner's ability to pay from June 14, 2004 (the priority date). We generally will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage, unless the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income or pay stubs. In this case, the evidence of record does not reflect what dates or time period that the petitioner employed the beneficiary in 2004. Therefore, the AAO will not prorate the proffered wage of \$39,416 in 2004 and determine that the petitioner must show that it had the ability to pay the full proffered wage in that year.

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).

The record before the director closed on April 7, 2008 upon 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 2006 federal income tax return was the most recent return available. The petitioner's tax returns demonstrate its net income (loss) for the years 2004 and 2005, as shown below:

Tax Year	Net Income (Loss)⁴ – in \$	Remainder of the PW – in \$
2004	(1,750)	3,226.30
2005	(18,720)	2,371.10

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net income to pay the proffered wage.

Alternatively, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on page 2, part III, lines 1 through 6 of the Form 1120-A. Its year-end current liabilities are shown on page 2, part III, lines 13 and 14, not lines 16 through 18 as counsel contends on appeal. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns demonstrate its end-of-year net current assets for the years 2004 and 2005, as shown below:

Tax Year	Net Current Assets – in \$	Remainder of the PW – in \$
2004	(14,956)	3,226.30
2005	(25,521)	2,371.10

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in either 2004 or 2005. Based on the net income and net current asset analysis above, the AAO agrees with the director that the petitioner does not have the ability to pay the proffered wage

⁴ For a C corporation, USCIS considers net income to be the figure shown on Line 24 of the Form 1120-A.

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

from the priority date and continuing until the beneficiary receives legal permanent residence, particularly in 2004 and 2005.

On appeal, counsel contends that in 2005 the beneficiary, due to a severe allergic reaction, had to miss a number of working days in the spring and summer of that year. In his sworn statement dated May 12, 2008 the beneficiary stated that he probably missed between two and three weeks of work because of his allergies. [REDACTED] the co-owner of the petitioning company, also wrote a letter to USCIS in which she stated that due to the beneficiary's absence in 2005, she had to hire a temporary replacement. Submitted along with the letter was a copy of a Form 1099-MISC of the employee who temporarily replaced the beneficiary in 2005. The temporary employee earned \$9,146.26.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, even though [REDACTED] stated that she had to hire a temporary replacement for the beneficiary while he was sick there is no evidence in the record showing that the temporary worker performed the beneficiary's duties. If the worker mentioned by [REDACTED] performed other kinds of work, such as bookkeeping, for instance, then that worker's wages could not be counted as wages available to pay the beneficiary. Additionally, the petitioner has not documented when the beneficiary was sick and when the temporary worker was hired or terminated.⁶ 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)).

Finally, although not raised by either the petitioner or counsel on appeal, 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

⁶ We note that the purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. Even though this consideration does not form the basis of the decision on the instant appeal, we decline to accept [REDACTED] statement as credible.

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.

We acknowledge that the petitioner has been in a competitive field since 1974;⁷ however, the record is devoid of evidence regarding the petitioner's reputation. Unlike *Sonegawa*, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Similarly, none of the evidence submitted reflects the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner's inability to pay the proffered wage especially in 2004 and 2005.

Beyond the decision of the director, the AAO finds that the beneficiary is not qualified to perform the duties of the position. Based on the evidence in the record, the beneficiary does not appear to have prior two years of work experience in the job offered before the priority date.

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

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

⁷ A search of the website of the Commonwealth of Virginia, State Corporation Commission, (https://cisiweb.scc.virginia.gov/z_container.aspx), shows that Upco Lock and Safe Service, Inc. was incorporated on August 2, 1974.

Here, as previously noted, the Form ETA 750 was filed and accepted for processing by the DOL on June 14, 2004. The name of the job title or the position for which the petitioner initially sought to hire is "Locksmith." Under box 14, (the minimum education, training, and experience for a worker to perform satisfactory the job duties described in box 13 above), the petitioner set forth the following requirements:

Education:	6 years of Grade School
Experience:	2 years of experience in the job offered or 2 years in related occupation in any locksmith work

On part B of the Form ETA 750, the beneficiary claimed that he had worked for the petitioner since December 1999, first as a locksmith assistant from December 1999 to January 2002 and then as a locksmith from February 2002 to present. This is consistent with the letter dated July 7, 2007 from [REDACTED] the co-owner of the petitioning company, who stated that the beneficiary worked for the petitioner as a locksmith assistant from January 2000 to February 2002 and as a locksmith from February 2002 to present.

In his sworn statement dated May 12, 2008 the beneficiary also stated that he had worked for the petitioner since December 1999. Based on the evidence submitted, it appears that the beneficiary gained the requisite two-year experience in the job offered from the petitioner before the priority date. This is not allowed by the DOL regulation. *See* 20 C.F.R. § 656.17(i).

The regulation at 20 C.F.R. §§ 656.17(i)(1)-(3) states:

1. The job requirements, as described must represent the employer's actual minimum requirements for the job opportunity.
2. The employer must not have hired with less training or experience for jobs substantially comparable to that involved in the job opportunity.
3. If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
 - i. The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
 - ii. The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

Here, the beneficiary had no experience in the job offered at the time of hire (December 1999). Nor did he have the experience in the alternate occupation in any locksmith work prior to the date of filing of the Form ETA 750. The record further does not show that the petitioner met

either one of the two exceptions as outlined by the regulation above. Specifically, the record does not demonstrate that it is no longer feasible to train a worker to qualify for the position. Nor does the record show that the beneficiary's position as a locksmith assistant from December 1999 to January 2001 and before the petitioner filed the Form ETA 750 with the DOL was not substantially comparable to the proffered job as a locksmith.

As noted earlier, the beneficiary stated in the Form ETA 750 part B that he worked for the petitioner as a locksmith assistant from December 1999 to January 2001 before he became a locksmith in February 2002, and before the petitioner filed the Form ETA 750 labor certification with the DOL on June 14, 2004.

The job description for a locksmith as stated in the Form ETA 750 part A, item no. 13 is as follows:

Installs, repairs, rebuilds and services mechanical or electrical locking devices, using handtools and special equipment. Disassembles locks such as padlocks, safe locks and door lacks [sic] and repairs or replaces worn tumblers, springs and other parts. Inserts new or repaired tumblers into lock to change combination. Cuts new or duplicate keys. Moves lockpick in cylinder to open door locks without keys. Open safe locks by drilling.

The job description for a locksmith assistant as stated in the Form ETA 750 part B, item no. 15.b. is as follows:

Assists the locksmith in the performance of installing, repairing, rebuilding and servicing mechanical or electrical locking devices. Load and unload tools, materials and equipment on truck. Provide and carry materials and tools to job sites. Clean work sites after completion of work.

Based on the jobs description above, we conclude that both positions – locksmith and locksmith assistant – are substantially comparable to each other. Pursuant to 20 C.F.R. §§ 656.17(i), the beneficiary is not qualified to perform the duties of the position, since he appears to have gained the experience in the job offered through his employment with the petitioner in a position substantially comparable to the position described in the Form ETA 750.

The AAO rejects the notion that the beneficiary could gain qualifications for the position by solely relying on his work experience with the petitioner. Even though the DOL has approved the Form ETA 750 in this case, USCIS is responsible to determine whether the beneficiary qualifies for the position or not. *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). The DOL's approval in this case only shows that there were no willing, able, and/or available U.S. workers to fill in the position. *Id.*

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Court of Appeals for the Ninth Circuit in *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983) held:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

Since the beneficiary had no other work experience in the job offered other than the experience he gained from the petitioner before the priority date, and because the experience gained from the petitioner as a locksmith assistant is shown to be substantially comparable to the proffered locksmith position, the AAO determines that the beneficiary is not qualified to perform the duties of the position. The petition is denied for this additional reason.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. As noted earlier, in visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.