



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: FEB 05 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
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,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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DISCUSSION: The employment-based visa petition was denied by the Director, Nebraska Service Center, (director) and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a domestic appliances import-export business. It seeks to employ the beneficiary permanently in the United States as a clerk-export division. 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 and that the beneficiary was qualified to perform the services of the occupation as of 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 September 8, 2009, denial, at 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. Also at issue is whether the beneficiary performed sufficient work experience as of the priority date so as to satisfy the requirements detailed on the labor certification.

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.

As a threshold issue, the appealing party has failed to establish that it is a successor-in-interest to the entity that filed the labor certification. 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 company that filed the appeal 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'r 1986).

The record establishes that the petitioning entity, [REDACTED], is no longer in operation. In response to a request from the AAO, the company that filed the appeal stated that in 2005, the petitioner converted to [REDACTED]. The IRS Forms W-2 issued to the beneficiary from 2001-2005 indicate that the Federal Employer Identification Number (FEIN) of [REDACTED], the petitioning entity, is [REDACTED]. The Forms W-2 issued to the beneficiary from 2006-2008 are from [REDACTED] FEIN [REDACTED]. The record does not establish that [REDACTED] is the successor-in-interest to [REDACTED].

Furthermore, neither of these FEINs matches the FEIN provided on the petition. Therefore, the identity of the petitioner is not clear from the evidence of record.

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 evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor. Accordingly, the petition is not approvable because the appealing party has failed to establish that it is a successor-in-interest to the company that filed the labor certification. As the director did not raise this issue, the AAO will not dismiss the appeal for failing to provide proof of the successor-in-interest relationship. This issue must be addressed in any further filing.

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, 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 Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.25 per hour (\$37,960 per year). The Form ETA 750 states that the position requires three years of high school education and two years of experience in the offered job.

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

On the petition, the petitioner claimed to have been established on May 28, 1980, and to currently employ 3,000 workers. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to have worked for the petitioner since September 1992.

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 provided Internal Revenue Service (IRS) Forms W-2² reflecting that the beneficiary was paid as follows:

2001	\$36,791.51
2002	\$41,607.60
2003	\$41,571.34
2004	\$41,675.64
2005	\$23,706.10

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).

² From 2006 through 2008 the beneficiary was paid by [REDACTED] a company that has not been established as the successor-in-interest to the petitioner. Thus, these amounts may not be considered as payments from the petitioner. Unless the petitioner establishes that [REDACTED] is its successor-in-interest, it would have to establish the ability to pay the proffered wage for 2006 through 2008 independently of the submitted W-2s. For purposes of the ability to pay analysis, the AAO will accept that the successorship has been established.

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2006	\$43,683.06
2007	\$45,127.84
2008	\$40,331.34

The petitioner paid wages to the beneficiary in excess of the proffered wage in 2002, 2003, 2004, 2006, 2007, and 2008. However, since the proffered wage is \$37,960 per year, the petitioner must establish that it can pay the difference between the proffered wage and the wages actually paid to the beneficiary in the remaining years; that is, \$1,168.49 in 2001 and \$14,253.90 in 2005.

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 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

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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.³

The petitioner’s federal income tax returns have not been provided. On appeal, the petitioner provided copies of “combined balance sheets of [REDACTED] and [REDACTED] as of December 31, 2002 and 2001 and the related combined statements of income and retained earnings and of cash flows for the years then ended. The [REDACTED] are under common ownership and common management.” These copies were accompanied by an “INDEPENDENT AUDITORS’ REPORT” dated April 3, 2003.

In this case, the petitioner has failed to submit any evidence explaining why the AAO should consider the combined financial statements of both companies, as they are not both the petitioning entity. The fact that the companies have common ownership and control does not allow the petitioner to utilize the financial resources of a separate corporation to establish the ability to pay the wage offered to the beneficiary. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders 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’r 1980). In a similar case, 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, these audited financial statements will not be considered.

³According 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.

In a letter dated April 13, 2009, [REDACTED] Sr. VP of corporate finance for the petitioner stated that the petitioner had over 2,020 employees and affirmed the petitioner's ability to pay the proffered wage. While 8 C.F.R. § 204.5(g)(2) does allow that in cases where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage, the regulation does not suggest that an attestation, alone, will be sufficient to establish the petitioner's ability to pay the proffered wage. The regulation states that additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner; however, the statement from the petitioner's Sr. VP of corporate finance is not supported by any of these pieces of evidence. Thus, we find that USCIS need not exercise its discretion to accept the letter as evidence of the petitioner's ability to pay the proffered wage.⁴

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 pay⁵ 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 (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

⁴ Further, as noted above, on appeal the petitioner stated that [REDACTED] (the company that was granted the labor certification in this case) "converted to [REDACTED] in 2005." However, the petitioner has failed to submit any documentation establishing that a qualifying successor-in-interest relationship exists between these companies.

⁵ It is noted for the record that even if the petitioner had established that [REDACTED] was its successor-in-interest, the petitioner has still failed to provide any evidence of its net income or net current assets in 2005. Therefore, the petitioner would still have failed to establish its ability to pay the proffered wage since the priority date.

of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has submitted very limited documentation of its financial situation and has not established the historical growth of its business or its reputation within its industry, nor has it claimed the occurrence of any uncharacteristic business expenditures or losses during the years in question. The identity of the petitioner and the successorship of [REDACTED] has not been established. 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 from the priority date onwards.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director's decision to deny the petition on this ground is affirmed.

Also at issue in this case is whether the beneficiary possessed the minimum experience required to perform the offered position by the priority date. The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position requires, at a minimum, three years of high school education and two years of experience in the offered position. The labor certification also states that the beneficiary qualifies for the offered position based on experience as a clerk-export division with an unnamed employer from November 1987 through September 1991⁶ and with the petitioner since September 1992. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an unsigned experience letter stating that the beneficiary worked in [REDACTED] from November 15, 1987, through September 8, 1991, as an "Assistant of Logistic Department and as a Delegate of Special and International Sales." The Spanish language original letter does not provide the name and address of the employer and the document is not signed. Thus, the letter does not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). Further, it is noted that the provided English translation of this document contains information that was not included in the Spanish language original document; namely, the original document does not list the name of the employer, while the translation identifies the employer as [REDACTED]

On appeal, counsel submitted a letter dated October 10, 2009, and signed by [REDACTED] general manager of [REDACTED]. This Spanish language letter was accompanied by an English translation. Mr. [REDACTED] attested to the beneficiary's employment there from November 15, 1987, through September 8, 1991, as an "Assistant in the Logistics Department where she was responsible for international and special sales." Unlike the earlier employment letter, this letter is written on company letterhead and does identify the individual making the attestation. However, it is noted that the employer's description of the beneficiary's duties does not seem to conform to the requirements listed on the labor certification. Specifically, the labor certification requires, at Line 13, the following skills from the job candidate:

- Managerial duties to include directing clerical staff.
- Must be familiar with household appliances and usage in the countries Mexico and El Salvador.

⁶ The beneficiary signed a declaration on October 28, year unspecified, suggesting that the employment described on the Form ETA 750B was for the Logistics Department at [REDACTED]

- Must be familiar with American, Asian and European Manufacturers to ensure the proper compatibility with the electric voltage availability in the subject countries to the appliances produced.
- Must be familiar with the use and purchasing trends of the consuming popular in the subject countries.
- Arrange shipping details, such as export licensing, letters of credit, custom declarations, packaging, shipping and routing of products.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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). Since the beneficiary's duties as described in the employment letter submitted on appeal do not satisfy the requirements detailed on the labor certification, it must be concluded that the petitioner has not established that the beneficiary was qualified to perform the services of the proffered job as of the priority date.

Additionally, it is noted that the two provided employment letters and the beneficiary's assertion on appeal all claim that the beneficiary was employed in [REDACTED] from November 15, 1987, through September 8, 1991. However, the record of proceeding contains a copy of the beneficiary's passport, which reveals she was issued a B1-B2 Nonimmigrant Visa on December 13, 1988, and last entered the United States at [REDACTED] on March 4, 1989.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The petitioner has failed to submit any objective evidence to explain or justify the discrepancy between the original employment letter and the provided translation. The petitioner has also provided no explanation for the discrepancy between the submitted employment documentation and the beneficiary's travel history as recorded in her passport. Therefore, the reliability of the remaining evidence offered by the applicant is suspect and it must be concluded that the petitioner has failed to establish that the beneficiary possessed all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). Consequently, the director's decision to deny the petitioner on this ground will be affirmed.

Finally, although the petitioner claims on appeal that its former counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not satisfy these requirements. The petitioner states that former counsel was “suspended by the State Bar of California,” but does not explain the facts surrounding the preparation of the instant petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.