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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: OFFICE: TEXAS SERVICE CENTER

FILE:

JAN 14 2013

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

If you believe the 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,

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 appeal will be dismissed.

The petitioner describes itself as a restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is May 3, 2001.²

The director's decision denying the petition concluded that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage.

The record shows that the appeal is properly filed 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 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

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

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

³ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

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 May 3, 2001. The proffered wage as stated on the Form ETA 750 is \$600 per week (\$31,200 per year). The Form ETA 750 states that the position requires two years of experience as a cook.

On the petition, the petitioner claimed to have been established in 1998 and to currently employ seven workers. The Form ETA 750B does not state the beneficiary worked for the petitioner.⁴

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).

The tax returns and W-2 Forms in the record are for a company named [REDACTED] [REDACTED] 2007 tax return states that the company's business activity is a repair shop, and its service is car repairs. The 2007 New York S Corporation Franchise Tax Return shows the principal business activity of [REDACTED] is a repair shop. Additionally, the petitioner stated on the Form I-140 it was established in 1998. However, the tax returns in the record provide different dates of establishment for [REDACTED] including 1970, 1998, and 2000. Although the EIN on the tax returns for [REDACTED] is the same as the EIN as listed for the petitioner on the Form I-140, there is no evidence in the record that [REDACTED] does business as [REDACTED]

⁴ The sole shareholder of the petitioner, [REDACTED] signed the Form ETA 750B for the beneficiary.

Therefore, the record contains multiple inconsistencies regarding whether the petitioner and [REDACTED] are the same entity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* Therefore, the petitioner has not demonstrated its ability to pay the proffered wage because it has not established that the submitted tax returns and W-2 Forms relate to the petitioner. However, as is explained in detailed below, even in the AAO considers the submitted tax returns and W-2 Forms, the petitioner has still failed to establish its ability to pay the proffered wage.

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 submitted Forms W-2 for years 2001 through 2008, to demonstrate the wages paid to the beneficiary, as shown on the table below.

- In 2001, the Form W2 stated Wages, tips, other compensation of \$11,200.
- In 2002, the Form W-2 stated Wages, tips, other compensation of \$11,375.
- In 2003, the Form W-2 stated Wages, tips, other compensation of \$20,000.
- In 2004, the Form W-2 stated Wages, tips, other compensation of \$20,020.
- In 2005, the Form W-2 stated Wages, tips, other compensation of \$19,250.
- In 2006, the Form W-2 stated Wages, tips, other compensation of \$22,140.
- In 2007, the Form W-2 stated Wages, tips, other compensation of \$32,140.
- In 2008, the Form W-2 stated Wages, tips, other compensation of \$32,500.

Therefore, for the years 2001 through 2006, the W-2 Forms in the record do not establish the beneficiary was paid a wage equal to or greater than the proffered wage. It is noted that the W-2 Forms for years 2001 through 2007 do not list the beneficiary's address in the required box; the 2008 W-2 Form lists the beneficiary's address as the same address as the petitioner's sole shareholder's address; and the W-2 Forms for 2005, 2006, and 2007, do not show the petitioner deducted the required social security tax. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Therefore, based on these unresolved irregularities relating to the submitted Forms W-2, this is an additional reason why the AAO will not consider the W-2 Forms in the ability to pay analysis.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10,

2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on March 23, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The most recent return in the record is for fiscal year 2007. According to the tax returns in the record, the [redacted] fiscal year

runs from October 1 to September 30. The tax returns in the record demonstrate net income for fiscal years 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net income⁵ of \$9,196 (for the period from October 1, 2002 to September 30, 2002).⁶
- In 2002, the Form 1120S stated net income of \$10,414 (for the period from October 1, 2002 to September 30, 2003).
- In 2004, the Form 1120S stated net income of \$15,470 (for the period from October 1, 2004 to September 30, 2005).
- In 2005, the Form 1120S stated net income of \$13,984 (for the period from October 1, 2005 to September 30, 2006).
- In 2006, the Form 1120S stated net income of \$24,403 (for the period from October 1, 2006 to September 30, 2007).
- In 2007, the Form 1120S stated net income of \$18,647 (for the period from October 1, 2007 to September 30, 2008.)

The record does not contain a copy of the [redacted] tax returns covering the period from the May 3, 2001 priority date until September 30, 2001. As is noted above, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.* The petitioner did not submit tax returns, annual reports or audited financial statements covering the period from the priority date. The petitioner’s failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner’s ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

⁵ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 19, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). In the instant case, the petitioner showed no additional income, credits, deductions, or other adjustments on its Schedule K.

⁶ For fiscal year 2001, the petitioner submitted the IRS Form 1120S for tax year 2000, and crossed out any reference to the year 2000 and replaced it with a hand-written “2001.” The instructions for the 2001 Form 1120S found at <http://www.unclefed.com/IRS-Forms/2001/i1120s.pdf>, states “Form 1120S is used to report the income, deductions, gains, losses, etc., of a domestic corporation that has elected to be an S corporation . . . and whose election is in effect for the tax year.” [Emphasis added.]

With regard to fiscal year 2003, in its response to the director's request for evidence, the petitioner stated that the IRS did not possess the tax transcript for the employer for the year 2003, and submitted the Form 13873-B sent to the petitioner by the IRS on March 3, 2009. However, this form also states that the an actual photocopy of a taxpayers older returns can generally be obtained for those tax returns filed in the past seven years. Therefore, it appears the petitioner could have requested a copy of its 2003 tax return. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Therefore, for the fiscal years 2001 through 2007, the petitioner did not have sufficient net income to pay the proffered wage.

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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. [REDACTED] tax returns demonstrate its end-of-year net current assets for fiscal years 2001 through 2007, as shown in the table below.⁸

- In 2001, the Form 1120S stated net current assets of \$12,289 (for the period from October 1, 2001 to September 30, 2002).
- In 2002, the Form 1120S stated net current assets of \$5,590 (for the period from October 1, 2002 to September 30, 2003).
- In 2006, the Form 1120S stated net current assets of \$4,639 (for the period from October 1, 2006 to September 30, 2007).
- In 2007, the Form 1120S stated net current assets of \$4,324 (for the period from October 1, 2007 to September 30, 2008).

⁷According 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.

⁸ It is noted the petitioner's fiscal year 2004 and 2005 tax returns do not contain Schedule L. It is also noted that the all tax returns submitted, except for fiscal year 2007, were hand-written, and the figures written on the Schedules L are not clearly legible. Therefore the figures used on the table are what were interpreted by the AAO.

Therefore, for the fiscal years 2001 through 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts for the years 2001, 2002, and 2003 that the salary paid to the beneficiary, plus officer's compensation reveals sufficient funds to pay the proffered wage. Since the record does not contain the petitioner's 2003 tax return, it is unclear how counsel made this determination. Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, the record does not contain a statement from officers that they are willing and able to forego the compensation necessary to pay the proffered wage.

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

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, counsel asserts that considering the number of years the petitioner has been in business, and the established historical growth of the petitioner's business, the petitioner has conclusively demonstrated sufficient capability to pay the proffered wage.

The majority of the documentation in the record belongs to [REDACTED] and not the petitioner. The record contains no definitive documentation to establish the number of years the petitioner has actually been in business, or of its historical growth. In the instant case, the petitioner has not submitted evidence establishing the number of its employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the evidence submitted and under the circumstances as described above, the AAO finds that the petitioner has not demonstrated by a preponderance of the evidence that it has the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position.⁹ The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience as a cook. The labor certification states the beneficiary qualifies for the offered position based on experience as a cook for [REDACTED] from April 1993 to October 2000.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(1)(3)(ii)(A). The record contains a statement from [REDACTED] stating the beneficiary was employed by [REDACTED] as an Italian specialty cook, from February 1991 to March 1993. However, the letter does not provide the address of the employer; state the title

⁹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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of the signatory; describe the duties performed by the beneficiary in detail; or, state if the job was full-time.

Further, [REDACTED] is not listed on the labor certification by the beneficiary as a prior employer. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.