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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 1 1 2013 OFFICE: TEXAS SERVICE CENTER FILE:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center (the director), and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is in the real estate and financial services business. It seeks to employ the beneficiary permanently in the United States as a senior mortgage loan counselor. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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. The director denied the petition accordingly.

On appeal, the AAO affirmed the director's finding that the petitioner did not establish the ability to pay the proffered wage. The AAO further determined that the petitioner failed to establish that the beneficiary is qualified or the offered position.

The record shows that the motion 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 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 motion.[1] On motion, counsel submits a brief, financial records for the beneficiary, an article on the subprime mortgage crisis, a copy of a redacted non-precedent AAO decision, a copy of excerpts from DOL's regulations and a copy of the AAO's decision.

8 C.F.R. § 103.5(a) provides, in pertinent part:

> (2) *Requirements for motion to reopen.*
> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . .
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> (3) *Requirements for motion to reconsider.*
> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

[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 8 C.F.R. § 103.2(a)(1).

The AAO finds that the petitioner has not filed a proper motion to reopen. The request was not accompanied by any new evidence or arguments based on precedent decisions. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[2] In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen.

On motion, counsel contends that the AAO erred in finding that the petitioner did not establish its ability to pay the proffered wage because the AAO failed to consider all evidence in the record. Counsel also contends that the AAO erred in finding that the beneficiary is not qualified for the offered position because the AAO incorrectly interpreted the labor certification and DOL regulations. The motion therefore meets the requirements for a motion to reconsider.

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on May 27, 2008. The proffered wage as stated on the Form ETA 9089 is $36,000.00 per year. The ETA Form 9089 states that the position requires an equivalent of a Bachelor's degree based on any suitable combination of education/training/experience in the field of business administration in financial management and 24 months of experience in the proffered position or as a mortgage loan officer or any suitable combination of education/training/experience.

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[2]The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation until 2009 and as an S corporation since 2009. On the petition, the petitioner claimed to have been established in 2007 and to currently employ 15 workers. On the ETA Form 9089, signed by the beneficiary on December 14, 2008, the beneficiary claimed to have started working for the petitioner on January 3, 2008.

As advised in the AAO's decision, the beneficiary's Internal Revenue Services (IRS) Forms W-2, Wage and Tax Statement, established that the petitioner paid partial wages in 2008 and the full proffered wage to the beneficiary in 2009 through 2011. On motion, counsel submits the beneficiary's 2012 IRS Form W-2 reflecting that the petitioner paid the beneficiary $36,000.00 in 2012. As such, on motion, the petitioner has established that it paid the beneficiary the proffered wage in 2012.

On appeal, counsel contended that the petitioner established it had paid the beneficiary the pro-rated proffered wage from the priority date of May 27, 2008 through the end of 2008. As advised in the AAO's decision, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2008, which is $21,000.00.

As advised in the AAO's decision, for the year 2008, the petitioner's federal tax transcripts demonstrate net income of -$3,975.00. The petitioner failed to submit any evidence of its net current assets. Therefore, the petitioner has not demonstrated its ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary ($21,000.00).

On motion, counsel contends that the petitioner can establish its ability to pay in 2008 by showing that it paid the beneficiary the proffered wage beginning with the priority date of May 27, 2008 through December 31, 2008. Counsel again requests that USCIS prorate the proffered wage for that portion of the year occurring after the priority date. As advised in the AAO's decision, USCIS will prorate the proffered wage if 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 statements or pay stubs. As discussed in the AAO's decision, for 2008, the record only establishes that the petitioner paid the beneficiary an amount of $15,000.00, for the months of July, August, September, October, and November.[3] On motion, counsel contends that a copy of two deposit tickets and the first page of two checking account statements[4] represent the money the petitioner paid the beneficiary for wages in May and June of 2008.[5]

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[3] The petitioner issued the beneficiary an IRS Form W-2 to reflect that it paid the beneficiary wages of $15,000 in 2008, which has been considered above. The petitioner paid the beneficiary's December 2008 wages in January 2009 and the petitioner is relying on those monies to establish its ability to pay in 2009. To consider the December 2008 wages in both 2008 and 2009 would not be appropriate.

[4] The checking account statements indicate that the beneficiary owns the checking account jointly with another individual. The checking account deposit slips and the checking account statements reflect deposits into the beneficiary's joint checking account of $2,998.00 and $3,000.00. Counsel submitted a copy of the petitioner's July 2008 bank statement showing that

Counsel contends that the AAO erred in finding that the evidence in the record did not establish that these deposits represented payments of wages from the petitioner to the beneficiary. Counsel contends that the AAO ignored the fact that the $2.00 difference in the May 2008 deposit could be accounted for and that it is an abuse of discretion to deny the petition over only a $2.00 short-fall in 2008. However, as described in the AAO's decision, whether there was a deficit of $2.00 is not the relevant issue. Rather the issue is that the petitioner has failed to establish that any of the deposits were as a direct result of monies paid to the beneficiary by the petitioner. As such, the AAO found that the petitioner had failed to establish that the petitioner had paid the beneficiary any amounts in May and June of 2008. As discussed in the AAO's decision, without a copy of the cancelled check issued in June 2008 or other evidence of the cash payment made in May 2008, the petitioner is unable to demonstrate that the beneficiary was the payee of these amounts. The petitioner's failure to submit the cancelled check cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The record contains no other evidence that the petitioner paid the beneficiary monies for employment in May and June of 2008, such as an IRS Form 1099 issued by the petitioner, petty cash receipts, or the beneficiary's personal income tax return. Additionally, there is no evidence that the beneficiary was the only individual depositing monies into the joint checking account. Although the lack of evidence was stated in the AAO decision, the petitioner failed to submit any evidence on motion. Counsel asserts that the petitioner's own statement that it paid the beneficiary $3,000.00 in May and June 2008 was overlooked by the AAO and is sufficient evidence of these payments. 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)). 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). Therefore the petitioner has not established that it paid the beneficiary in May and June 2008.

On motion, counsel contends that the business was established in 2007 and suffered an industry related loss in response to the subprime mortgage crisis. Counsel states that the article submitted on motion reflects that there were a series of events and conditions which led to a financial crisis and subsequent recession in 2008, which was reflected in the petitioner's 2008 tax return. Counsel asserts that despite these setbacks, the petitioner was able to keep its business afloat and employed the beneficiary throughout the crisis and beyond. As discussed in the AAO's decision, the gross sales amounts on the petitioner's tax records do not reflect a steady increase over the years and, as discussed above, the petitioner failed to establish that it would be able to pay the proffered wage in 2008.

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check number 2232, in the amount of $3,000.00, cleared its account on July 3, 2008; however, there was no copy of the check number 2232 to reflect that this money was actually paid to the beneficiary.

[5] Counsel asserts that the beneficiary was paid off the payroll for May and June of 2008.

As advised in the AAO's decision, counsel's assertions on appeal could not be concluded to outweigh the evidence in the record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL. On motion, counsel's assertions also cannot be concluded to outweigh the evidence.

Therefore, the petitioner has failed to establish its ability to pay the proffered wage in 2008 through an examination of wages paid to the beneficiary, net income, net current assets or the totality of the circumstances.

As advised in the AAO's decision, beyond the decision of the director,[6] the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (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).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
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> > (A) *General.* 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.

As advised in the AAO's decision, in the instant case, the labor certification states that the offered position is for a senior mortgage loan counselor and requires the equivalent of Bachelor's degree based on any suitable combination of education/training/experience in the field of business administration in financial management and 24 months of experience in the proffered

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[6] 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).

position or as a mortgage loan officer or any suitable combination of education/training/experience.

On the labor certification, regarding education, Part J of the labor certification states that the beneficiary has the equivalent of a Bachelor's degree in Business Administration in Financial Management from in Quito, Ecuador completed in . Regarding experience, Part K of the labor certification states that the beneficiary qualifies for the offered position based on experience as a mortgage loan officer with in Orlando, FL from April 13, 2005 through October 31, 2007 and her supervisor was Part K also states that the beneficiary began working with the petitioner on January 3, 2008.

As advised in the AAO's decision, the labor certification at Part H.4. indicates that the petitioner intended to consider an alternative to a United States bachelor's degree or a single foreign equivalent degree; however, Part H.8. states that no alternate combination of education and experience will be accepted. To reconcile these statements, in response to the AAO's RFE, counsel stated that the petitioner would have accepted "a U.S. degree, a foreign degree, experience equivalent to a degree, or any combination of education, training and experience that is equivalent to a bachelor's degree." The petitioner submitted: a copy of its signed recruitment report, which states 12 resumes were received; the prevailing wage determination; copies of print and on-line advertisements; and a copy of the posted notice. The petitioner also submitted a copy of computer printout indicating the job order was created on March 7, 2008, but did not submit a copy of its content.

In its decision, the AAO noted that the evidence submitted in response to the RFE contained inconsistencies with the ETA Form 9089. Specifically, the AAO found the following unresolved inconsistencies:

- The labor certification states the proffered position is senior mortgage loan counselor, while the print and on-line advertisements and the prevailing wage determination state the proffered position as mortgage loan counselor.
- The labor certification states the petitioner will consider 24 months in the alternate occupation of mortgage loan officer, yet the print and on-line advertisements and prevailing wage determination do not mention experience in an alternate occupation.
- The labor certification indicates that the petitioner will accept any suitable combination of education/training/experience for the 24 months of experience requirement, but none of the petitioner's advertising or prevailing wage determination includes this language.
- The labor certification requires 24 months of experience, yet the petitioner's posting notice requires no experience.

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[7]The labor certification at Part J, questions 18 and 20 further indicate the beneficiary is relying on experience with

On motion, counsel contends that the AAO improperly imposed additional requirements to the labor certification which are not required by DOL regulations. We emphasize that federal circuit courts have upheld our authority to inquire as to whether the alien is qualified for the classification sought.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977).

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984). A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l Comm'r 1977).

On the labor certification, regarding education, Part J of the labor certification states that the beneficiary has the equivalent of a Bachelor's degree in Business Administration in Financial Management from [redacted] in Quito, Ecuador completed in [redacted].

While the beneficiary holds a Bachelor's degree, it is not in the field of study required as set forth in the labor certification.[8] On appeal, counsel contended that the beneficiary had the equivalent of a bachelor's degree based on eleven years of experience. The record contains an evaluation of the beneficiary's credentials prepared by [redacted] on September 28, 2004. The evaluation concludes that the beneficiary's degree from [redacted], the [redacted] along with a seminar in computer training and earning an advanced level of [redacted] (both of which are not documented in the file) equate to a Bachelor of Arts degree in Hospitality and Tourism or alternatively 60 academic credit hours toward a Bachelor of Science degree in Business Administration at a regionally accredited United States institution. [redacted] continues by considering the beneficiary's purported 11 years of work experience,[9] and applies the nonimmigrant rule equating three years of experience for one year of education to ultimately conclude that the beneficiary's academic credentials plus professional work experience are the equivalent of a Bachelor of Science degree in Business Administration with a major in Financial Management.[10] On motion counsel fails to address the fact that the record contains evidence of only ten years of the beneficiary's work experience, instead of the cited eleven years of experience.

Because the labor certification permits the use of "any suitable combo of education/training/experience in the field of business administration in financial management,"

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[8] The field is business administration in financial management.
[9] The file documents less than 10 years of work experience.
[10] The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to nonimmigrant H-1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

the AAO must look to the petitioner's intent. On motion, counsel contends that the AAO's decision improperly found deficiencies in the record regarding documentation not required by DOL regulations. Counsel asserts that the petitioner's intentions were consistent with the requirements of the labor certification and the evidence submitted to the AAO made the petitioner's intentions abundantly clear. However, as discussed in the AAO's decision in great depth, the noted inconsistencies reflect that the record does not contain any evidence showing that the petitioner actually used defined equivalent requirements in the petitioner's labor market test.[11] Although the AAO RFE permitted the petitioner to submit any evidence that it intended the labor certification to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers, the documentation in the record of proceeding as currently constituted creates ambiguity concerning the actual minimum requirements of the proffered position.[12] The petitioner has not resolved the noted inconsistencies with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-592. In light of the inconsistencies noted in the AAO's decision and counsel's failure to

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[11] The DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [U.S. Citizenship and Immigration Services (USCIS)] to accept the employer's definition" and SESAs should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

[12] In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. *See Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. *See Id.* at 14.

overcome those inconsistencies, the petitioner has failed to submit evidence to establish the petitioner's intent regarding the terms set forth on the labor certification.

On motion, counsel contends that it was inappropriate for the AAO to find a deficit in the record regarding the job order. As discussed in the AAO's decision, regarding the job order, counsel cites to *A Cut Above Ceramic Tile*, 2010-PER-00224 (2012 BALCA), for the premise that the petitioner is not required to submit a copy of the job order and that the start and end dates of the job order as entered on the labor certification serve as documentation that the job order was placed. Counsel does not state how the DOL's Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a). Moreover, the AAO did not request the job order as proof that it was placed, but rather to review the job order to determine the petitioner's intent regarding the minimum requirements of the offered position. Further, although the AAO noted that the petitioner failed to submit the 12 resumes discussed in the recruitment report, the petitioner continues to fail to submit this evidence on motion. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. §103.2(b)(14).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motion to reconsider is granted. Upon reconsideration, the AAO's decision, dated March 18, 2013, is affirmed. The petition will remain denied.