



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF M-C-S-, INC.

DATE: OCT. 14, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an owner and operator of a convenience store, seeks to permanently employ the Beneficiary as a manager in the immigrant classification of skilled worker or professional. *See* Immigration and Nationality Act (the Act) § 203(b)(3)(A), 8 U.S.C. § 1153(b)(3)(A). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.¹

The Director concluded that the record did not establish the Beneficiary's possession of the qualifying experience for the offered position as specified on the accompanying labor certification by the petition's priority date. Accordingly, he denied the petition on July 7, 2009.

The record shows that the appeal is properly filed and alleges specific errors in law and fact. The record documents the case's procedural history, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.²

I. THE PETITION'S PRIORITY DATE

A petition's priority date is generally the date the U.S. Department of Labor (DOL) received an accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), for processing. *See* 8 C.F.R. § 204.5(d). An employer may use the priority date of a

¹ A Form G-28, Notice of Entry of Appearance, accompanied the instant appeal. However, the form does not identify the Petitioner's purported representative as an attorney or accredited representative. *See* 8 C.F.R. § 103.2(a)(3) (allowing only an attorney or an accredited representative to represent a petitioner in visa petition proceedings). The form also does not describe the organization named on the form as an accredited organization. *See* 8 C.F.R. § 292.2. We therefore do not recognize the organization named on the form as the Petitioner's representative in this matter.

² 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), allow the submission of additional evidence on appeal.

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labor certification application it filed before March 28, 2005 if a job order has not been placed for the application. 20 C.F.R. § 656.17(d)(1).

To use the priority date of a prior labor certification application, an employer must “refile” the application for an “identical job opportunity,” effectively withdrawing the original application. *Id.* A job opportunity is identical if the employer, alien, job title, job requirements, and job description are the same as those stated on the prior application. 20 C.F.R. § 656.17(d)(4).

The instant Petitioner “refiled” the accompanying labor certification application on April 17, 2007.³ On Part A of the ETA Form 9089, the Petitioner indicated that it was requesting the original filing date of a previously submitted application filed on November 28, 2000, with a case number of [REDACTED].⁴ The DOL approved the refiled application with the November 28, 2000, priority date of the original filing.

Employers may refile a labor certification application only “if a job order has not been placed” pursuant to the regulations then effective. 20 C.F.R. § 656.17(d)(1). In addition to properly withdrawing the original application, an employer must submit an application for an identical job opportunity. 20 C.F.R. §§ 656.17(d)(1)(i), (ii).

The record does not support the approval of the Petitioner’s refiled labor certification application. U.S. Citizenship and Immigration Services (USCIS) received a prior petition on behalf of the Beneficiary accompanied by the original labor certification filing, which indicated DOL certification on March 14, 2006. Certification of the original filing required the placement of a job order. *See* 20 C.F.R. § 656.21(f) (2004) (requiring placement of a job order with a local job service for 30 days).⁵ Therefore, contrary to the refiling criteria stated at 20 C.F.R. § 656.17(d)(1), a job order appears to have been placed for the certified job opportunity before the Petitioner refiled the labor certification application.

Also, the Petitioner’s refiled application does not appear to be for an “identical job opportunity.” The refiled application identifies the offered position as manager, involving daily management of a convenience store. The job opportunity of the refiled application requires 24 months of experience in the job offered, but no education. USCIS records show the application’s original filing by a company

³ The record contains conflicting evidence of the date of the application’s refiling. In an August 7, 2007, letter, the Petitioner’s president identifies the refiling date as both November 28, 2006 and April 17, 2007. However, the record contains a copy of a DOL notice stating the agency’s receipt of the refiling on April 17, 2007. The application also states the Beneficiary’s experience as of April 17, 2007. Therefore, the preponderance of the evidence establishes the application’s refiling date as April 17, 2007.

⁴ Evidence of record indicates that a labor certification with case number [REDACTED] for employer [REDACTED] and the instant Beneficiary was certified by the DOL on March 14, 2006, with a priority date of November 28, 2000.

⁵ Because the prior labor certification application was filed before March 28, 2005, the DOL’s current regulations do not govern that application. *See* Final Rule for Labor Certification Regulations, at 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). We therefore cite to DOL regulations as they existed in 2004.

with a name and address different than the Petitioner. The original filing was for an accountant, a position involving the preparation of financial statements, tax reports, and budgets. In addition to two years of experience, the original offered position required a Bachelor's degree in accounting.

The record does not demonstrate the Petitioner's eligibility to use the November 28, 2000, priority date. A job order had been placed based on the original filing, and the refiled application was not for an identical job opportunity. Thus, on October 22, 2012, we notified the Petitioner of the appeal's abeyance while we consulted DOL regarding the validity of the refiled labor certification. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b) (requiring USCIS to consult with DOL in the adjudication of employment-based immigrant visa petitions).

On December 2, 2013, DOL's Certifying Officer stated that the refiled labor certification should not have been approved and that the agency would initiate proceedings to revoke the application's certification. *See* 20 C.F.R. § 656.32(a) (authorizing DOL to revoke the certification of a labor application if its approval was "not justified"). However, as of this decision's date, DOL records do not indicate the agency's initiation of revocation proceedings.

A labor certification remains valid for the particular job opportunity, the alien, and the geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). We may invalidate a labor certification after its issuance. However, we may do so only "upon a determination . . . of fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

Although the accompanying, refiled labor certification appears to have been approved in error, we lack authority to invalidate it or change its priority date. Like the original labor certification filing, the refiled labor certification identifies the Beneficiary as the prospective employee. The record also indicates the Petitioner's intention to employ the Beneficiary in the particular job opportunity and the geographic area of intended employment stated on the refiled labor certification. In addition, the record does not establish fraud or willful misrepresentation of a material fact involving the accompanying labor certification. The accompanying, refiled labor certification therefore remains valid.⁶

II. THE BENEFICIARY'S QUALIFYING EXPERIENCE

A beneficiary must meet all of the requirements of an offered position specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of a job opportunity. We may neither ignore a

⁶ Our findings do not preclude DOL from initiating labor certification revocation proceedings under 20 C.F.R. § 656.32(a).

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term of the labor certification, nor impose additional requirements. See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

As discussed above, the Petitioner requested use of the earlier filing date of November 28, 2000. Therefore, the Petitioner must demonstrate the Beneficiary's possession of the minimum requirements of the offered position of manager by November 28, 2000. The accompanying labor certification states the minimum requirements of the position as 24 months of experience in the job offered.

The Beneficiary attested on the labor certification to about 39 months of full-time experience in the job offered before he began working at [REDACTED] in the offered position on September 25, 2003. The Beneficiary stated that he worked for [REDACTED] as a manager from June 16, 2000 to September 17, 2003.

A petitioner must support a beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must provide the employer's name, address, and title, and a description of a beneficiary's experience. *Id.*

The instant record contains an August 6, 2007, letter from a managing director on [REDACTED] stationery. The letter states the Beneficiary's full-time employment by [REDACTED] as a manager from June 16, 2000 to September 17, 2003.

As the Director noted, the labor certification and the [REDACTED] letter state only about five months of qualifying experience before the requested filing date of November 28, 2000. The record therefore does not establish the Beneficiary's possession of at least 24 months of experience as specified on the accompanying labor certification.

Also, the Beneficiary's claimed qualifying experience at [REDACTED] conflicts with other evidence of record. On the original labor certification application, which the Beneficiary signed on October 16, 2000, he attested that he had worked for [REDACTED] since February 2000 as an accountant, preparing financial statements, tax reports, and budgets. As previously indicated, the [REDACTED] letter and the instant labor certification state the Beneficiary's employment as a convenience store manager from June 16, 2000 to September 17, 2003.

Copies of the Beneficiary's IRS Forms W-2 Wage and Tax Statements also indicate his work for employers other than [REDACTED] from 2000 through 2003. The record indicates his receipt of Forms W-2 from [REDACTED] in 2002 and 2001, and from [REDACTED] and [REDACTED] in 2002. The Forms W-2 from other employers suggest that the Beneficiary did not continuously work full-time for Food Basket from 2000 to 2003 as indicated by the accompanying labor certification and the [REDACTED] letter. The discrepancies in the Beneficiary's claimed employment with [REDACTED] cast doubts on his qualifying experience for the offered position. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

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In addition, USCIS records indicate a sibling relationship between the Beneficiary and the signatory of the [REDACTED] letter. USCIS records indicate that the respective mothers and fathers of the men share the same names. The stated family last names of the men differ by only one letter. Further, USCIS records indicate the Petitioner's filing of two immigrant visa petitions on behalf of the signatory of the [REDACTED] letter, suggesting a close relationship among the Petitioner's president, the Beneficiary, and the signatory of the [REDACTED] letter. Because USCIS records indicate a familial relationship between the Beneficiary and the signatory of the [REDACTED] letter, the letter does not constitute independent, objective evidence of the Beneficiary's qualifying experience. *See Matter of Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficient of remaining evidence in support of a petition).

In response to the Director's request for evidence dated April 28, 2009, the Petitioner submitted a copy of a June 6, 2006, letter from a manager on [REDACTED] stationery. The letter states the Beneficiary's employment from June 5, 1994 to February 13, 2000 as an accountant.

As the Director found in his decision, the letter on [REDACTED] stationery does not establish the Beneficiary's qualifying experience in the job offered. The letter states the Beneficiary's employment as an accountant, not in the offered position of manager. In Part H.10 of the accompanying ETA Form 9089, the Petitioner stated that it would not accept experience in an alternate occupation. The letter therefore does not establish the Beneficiary's possession of at least 24 months of experience in the job offered as specified on the labor certification.

Also, although printed on [REDACTED] stationery, the letter states the Beneficiary's employment by [REDACTED]. The record does not establish that [REDACTED] did business as [REDACTED]. The letter therefore does not establish the Beneficiary's claimed employment with [REDACTED]. In addition, the letter on [REDACTED] stationery does not describe the Beneficiary's purported experience pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter therefore does not establish the Beneficiary's qualifying experience for the offered position.

On appeal, the Petitioner's president stated that the Petitioner mistakenly submitted the letter on [REDACTED] stationery and that the Beneficiary gained the required qualifying experience with a different employer before the petition's priority date of November 28, 2000. The Petitioner submitted a letter from a purported former supervisor of the Beneficiary, a memorandum from his purported former employer, and his earnings statement from the U.S. Social Security Administration as evidence of his employment by [REDACTED] from 1990 to 1993.

The letter is on the personal stationery of the Beneficiary's purported former supervisor and indicates her current employment as a social studies curriculum specialist. The letter states the Beneficiary's employment from 1990 to 1993 as a store manager for [REDACTED] which operated as [REDACTED], before becoming a district manager. The letter states that the company no longer does business.

The record does not establish the purported former supervisor's employment by [REDACTED]

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Stores or her direct, personal knowledge of the Beneficiary's employment by that company. *See* 8 C.F.R. § 103.2(b)(i) (stating that affidavits must be from people who have "direct personal knowledge of the event and circumstances"). The letter also does not state the Beneficiary's purported duties at National Convenience Stores pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter therefore does not establish the Beneficiary's qualifying experience with [REDACTED]

The January 12, 1993, memo is on the stationery of [REDACTED] and signed by a purported member of the company's corporate training department. The memo congratulates participants for successfully completing a certification program in food service management and states that a certificate of completion is attached. However, the memo does not identify the Beneficiary as an employee of [REDACTED] or as a program participant. In fact, the memo does not refer to the Beneficiary at all. The memo also does not contain an attached certificate of completion. The memo therefore has little value as evidence of the Beneficiary's qualifying experience.

The Beneficiary's Social Security earnings statement, dated March 15, 2006, indicates his employment in the U.S. from 1990 to 1993. However, the statement does not identify his employer(s) or position(s) during that period. Therefore, this statement also is of little value in demonstrating the Beneficiary's qualifying experience.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the qualifying experience for the offered position specified on the accompanying labor certification by the petition's priority date. We will therefore affirm the Director's denial of the petition.

III. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

Beyond the Director's decision, the record also does not establish the Petitioner's continuing ability to pay the Beneficiary's proffered wage.⁷

A petitioner must demonstrate its continuing ability to pay a beneficiary's proffered wage from a petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining a petitioner's ability to pay, we examine whether the petitioner paid a beneficiary the full proffered wage each year from the petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage each year, we examine whether it had sufficient annual net income or net current asset amounts to pay the difference between the wages paid, if any, and the proffered wage.⁸ If a petitioner's net income or net current assets are insufficient, we may also

⁷ We may deny a petition on grounds unidentified by a director. *See* 5 U.S.C. § 557(b) (stating that, except as limited by notice or rule, a federal agency on review retains all the powers it had in issuing the original decision).

⁸ Federal courts have upheld our method of determining a petitioner's ability to pay. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th

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consider the overall magnitude of its business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

Contrary to 8 C.F.R. § 204.5(g)(2), the instant record does not contain copies of the Petitioner's annual reports, federal income tax returns, or audited financial statements from the requested filing date of November 28, 2000. Indeed, the record does not indicate the Petitioner's formation until [REDACTED]. However, the Petitioner argues that it is the "successor in interest" to predecessor companies that operated the convenience store and submits evidence of their abilities to pay the proffered wage from the requested filing date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 481-82 (Comm'r 1986) (holding that a petitioner seeking to use a labor certification filed by another company must establish the ability of the other company to pay the proffered wage from the petition's priority date).

To establish a valid successor relationship for immigration purposes, a petitioner must establish its acquisition of the essential rights and obligations needed to carry on the business of a labor certification employer. A petitioner must: fully describe and document the transactions transferring ownership to it of all, or relevant parts of, the predecessor companies; demonstrate that the job opportunity described on the labor certification remains the same; and establish eligibility for the immigrant visa in all respects, including the abilities of all the employers to pay the proffered wage during the relevant period. *See Matter of Dial Auto*, 19 I&N Dec. at 481-82.

The Petitioner submitted letters from officers of its purported predecessors. The letters assert that [REDACTED] operated the convenience store from 2000 until September 2, 2003, when [REDACTED] acquired the business. The record does not indicate exactly when the Petitioner acquired the business. However, as previously indicated, the record indicates the Petitioner's incorporation in [REDACTED]. The Beneficiary also received Forms W-2 from both [REDACTED] and the Petitioner in [REDACTED], suggesting the Petitioner's acquisition of the business in [REDACTED].

The 2003 federal income tax return of [REDACTED] indicates its securing of a \$130,000 mortgage in connection with a purchase from [REDACTED]. However, the record does not contain any additional documentary evidence in support of the Petitioner's claimed successor-in-interest relationships. The record does not contain copies of purchase agreements, corporate documents, or business licenses to establish the purported transactions that transferred the essential rights and obligations of the convenience store from the labor certification employer to the Petitioner. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (stating that uncorroborated assertions are insufficient to meet the burden of proof in visa petition proceedings).

Moreover, the original labor certification was filed by [REDACTED] not by [REDACTED]. The record does not indicate whether any relationship existed between [REDACTED].

Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

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and the labor certification employer. The record therefore does not establish the Petitioner's successor-in-interest relationship to the original labor certification employer.

Also, the signatory of the [REDACTED] letter also signed a May 14, 2009, letter as the president of [REDACTED] in support of the Petitioner's claimed successor-in-interest relationship. As previously indicated, USCIS records indicate that the signatory and the Beneficiary are brothers. The May 14, 2009, letter on [REDACTED] stationery therefore does not constitute independent, objective evidence of the Petitioner's claimed successorship in interest.

In addition, the record does not establish the ability of [REDACTED] to pay the proffered wage from 2000 through 2002. Contrary to 8 C.F.R. § 204.5(g)(2), the record does not contain a copy of the company's annual report, complete federal income tax return, or audited financial statements for 2000. The company's federal income tax returns also reflect insufficient annual net income amounts in 2001 and 2002, and insufficient annual net current asset amounts for 2000 through 2002.⁹ The record does not contain any evidence that [REDACTED] paid the Beneficiary wages during that period.

Thus, for the foregoing reasons, the record does not establish the Petitioner as the successor in interest to the original labor certification employer. Therefore, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's requested filing date onward.

In addition, USCIS records indicate the Petitioner's filing of two other Forms I-140, Petitions for Alien Workers, which remained pending after the instant petition's requested filing date.¹⁰ As previously indicated, USCIS records identify the beneficiary of the two other petitions as the instant Beneficiary's brother.

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2); *see also Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (stating that a petition's job offer must be "realistic"). Therefore, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the beneficiary of its two other pending petitions. The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiary obtained lawful permanent residence, or until the petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not establish its ability to pay multiple beneficiaries).

The evidence of record does not document the priority dates or proffered wages of the Petitioner's other petitions, or whether it paid wages to the other beneficiary. The record also does not indicate whether

⁹ Because a copy of [REDACTED] annual report, federal income tax return, or audited financial statements for 2000 was not submitted, the record does not reflect the company's net income amount for that year. However, we were able to calculate the company's net current assets for 2000 from the Schedule L in its 2001 federal income tax return, which reflects the company's net current assets for the end of 2000/beginning of 2001.

¹⁰ USCIS records identify the receipt numbers of the other petitions as [REDACTED] and [REDACTED]

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any of the other petitions were withdrawn, revoked, or denied, or whether the other beneficiary obtained lawful permanent residence. The record therefore does not establish the Petitioner's continuing ability to pay the combined proffered wages of the instant Beneficiary and the beneficiary of its other petitions. As previously indicated, we may also consider the overall magnitude of a petitioner's business activities in determining its ability to pay a proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. at 614-15. In *Sonogawa*, the petitioner conducted business for more than 11 years, routinely earning a net annual income of about \$100,000. However, the petitioner's tax returns for the year of the petition's filing did not reflect its ability to pay the proffered wage. During that year, the petitioner relocated its business, causing it to pay rent on two locations for a five-month period, to incur substantial moving costs, and to briefly suspend its business operations. Despite these setbacks, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established its ability to pay. The petitioner established that she was a fashion designer whose work had been featured in national magazines. The record indicated that her clients included the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed in California. The record also indicates that the petitioner lectured at design and fashion shows throughout the U.S. and at California colleges and universities.

As in *Sonogawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current asset amounts. We may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation within its industry; whether the beneficiary will replace a current employee or outsourced service; and other evidence of its ability to pay a proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since [REDACTED]. Payroll tax records show that, as of the first quarter of 2007, it employed three people. The Petitioner's tax returns indicate that its annual amounts of gross revenues and wages paid remained stable in 2007 and 2008.

Unlike in *Sonogawa*, the record does not indicate the occurrence of any uncharacteristic business expenses or losses, or the Petitioner's outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. Also unlike in *Sonogawa*, the Petitioner has not established a successor-in-interest relationship to the labor certification employer or its ability to pay multiple beneficiaries. Thus, assessing the totality of the circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

IV. CONCLUSION

The record does not establish the Beneficiary's possession of the qualifying experience specified on the accompanying labor certification by the petition's requested filing date. We will therefore affirm the Director's denial of the petition. In addition, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's requested filing date onward.

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The petition will be denied for the above stated reasons, with each considered an independent and alternative basis for denial. In visa petition proceedings, a petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of M-C-S-, Inc.*, ID# 15942 (AAO Oct. 14, 2015)