



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

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

MATTER OF A-, INC.

DATE: SEPT. 12, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a consulting services business, seeks to permanently employ the Beneficiary as a director of project management under the third preference immigrant classification of skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least 2 years of training or experience.

The Director, Nebraska Service Center, denied the petition. The Director found that the Petitioner did not establish its continuing ability to pay the proffered wage of the job offered from the priority date of the petition onward.

The matter is now before us on appeal. The Petitioner has submitted a brief and copies of previously submitted documentation and asserts that these materials establish its continuing ability to pay the proffered wage from the priority date up to the present. Upon *de novo* review, we will dismiss the appeal.

#### I. PROCEDURAL HISTORY

The Form I-140, Immigrant Petition for Alien Worker, was filed on April 30, 2015. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which was filed with the U.S. Department of Labor (DOL) on June 2, 2014, and subsequently certified by the DOL on November 5, 2014. In section G of the labor certification, the Petitioner stated that the proffered wage for the job offered is \$145,891 per year. In section K of the labor certification, the Petitioner stated that it had employed the Beneficiary since June 15, 2011, initially as director of solutions architecture and currently as director of project management.

As evidence of the Petitioner's ability to pay the proffered wage, the Petitioner submitted copies of the following documentation in response to the Director's request for evidence (RFE):

- The Beneficiary's IRS Form W-2, Wage and Tax Statement, for 2014;
- The Beneficiary's bimonthly pay statements from January through October 2015;

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- The Petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2014;
- The Form W-2 of the Petitioner's Chief Executive Officer (CEO) for 2014;
- Pay statements of the Petitioner's CEO from January to mid-October 2015;
- A statement from the Petitioner's CEO and minority shareholder, dated November 12, 2015, stating that he would reduce his compensation of \$180,000 in 2015 by \$50,000 to cover the difference between the proffered wage and the Beneficiary's actual compensation in 2015;
- The Petitioner's monthly bank account statements from May 31, 2014, through October 30, 2015; and
- An evaluation of the Petitioner's ability to pay the proffered wage by a professor of accounting at [REDACTED] dated November 11, 2015.

On November 25, 2015, the Director denied the petition on the ground that the Petitioner did not establish its ability to pay the Beneficiary the full proffered wage. The Director noted that the Beneficiary's Form W-2 and pay statements showed that he was compensated at the annual rate of \$96,000 in 2014 and 2015 – well below the proffered wage of \$145,891 – and that the Petitioner's federal income tax return showed a net loss and net current liabilities in 2014. Based on this documentation, the Director found that the Petitioner did not establish its ability to pay the proffered wage in 2014 and 2015, and denied the petition on that ground.

The Petitioner filed an appeal on December 24, 2015, which was supplemented by a brief from counsel and copies of documents already in the record. The Petitioner claims that the Director's decision was erroneous because he did not consider all of the evidence in the record and did not consider the totality of the circumstances in accord with prior case law in determining the Petitioner's ability to pay the proffered wage. The Petitioner asserts that the preponderance of the evidence establishes its ability to pay the proffered wage, and requests that the Director's decision be reversed.

## II. LAW AND ANALYSIS

### A. Petitioner's Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

*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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by the Service.

Thus, the Petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). In this case, the priority date is June 2, 2014.

The Petitioner must establish that its job offer to the Beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the certified ETA Form 9089, 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, U.S. 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 also 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, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. 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 is considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In this case, the record shows that the Beneficiary has been employed by the Petitioner since before the priority date. The proffered wage of the job offered, as stated in Part G of the ETA Form 9089, is \$145,891 per year. The Beneficiary's Form W-2 for 2014 shows that he received "wages, tips, other compensation" of \$96,000, which was \$49,891 below the proffered wage. The Beneficiary's pay statements in 2015 show that he continued to be paid at an annual rate of \$96,000, which was \$49,891 below the proffered wage. Thus, the Petitioner has not established its ability to pay the proffered wage from the priority date onward based on the wages actually paid to the Beneficiary since then.

If the petitioner does not establish that it has paid the beneficiary an amount at least equal to the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures entered on the petitioner's federal income tax return(s). If either of these figures equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year. There is ample judicial precedent for determining a petitioner's ability to pay the proffered wage based on its federal income tax returns. See, e.g., *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)).

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The record includes a copy of the Petitioner's Form 1120 for 2014. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120. Net current assets (or liabilities) are the difference between the Petitioner's current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L. As shown in the Petitioner's 2014 tax return, the Petitioner had a net loss of -\$233,373 and its net current assets were -\$274,137 (the difference between its current assets of \$374,538 and its current liabilities of \$648,675). Thus, the Petitioner's net income and net current assets were not sufficient to make up the difference between the proffered wage and the compensation the Beneficiary actually received in 2014.

The Petitioner claims that its corporate account statements from [REDACTED] demonstrate its continuing ability to pay the proffered wage from the priority date onward because the closing balance every month from June 2014 through October 2015 exceeded the Beneficiary's proffered monthly wage of \$12,157.<sup>1</sup> The Petitioner's claim is incorrect, however, since the bank account records show that the closing balance was below \$12,157 for 3 different months during this time frame – including \$9850.49 on March 31, 2015; \$7327.15 on June 30, 2015; and \$11,739.77 on August 31, 2015. Moreover, the Petitioner's calculation of its ability to pay the proffered wage from its corporate bank account does not take into account that the bank balance would have dropped each month by the amount needed to cover the shortfall between the proffered wage and the amount actually paid to the Beneficiary in 2014 and 2015. Since the Beneficiary's wage rate of \$96,000 per year in 2014 and 2015 was \$49,891 below the proffered wage, the monthly shortfall was \$4158. If the bank account balance had dropped by that amount each month from the priority date on June 2, 2014 onward, the cumulative reductions over the last 7 months of 2014 would have reduced the year-end balance by \$29,106, and would have totally depleted the account by February 2015 since the actual balance on February 28, 2015, stood at just \$14,784.92. Thus, the documentation of record does not support the Petitioner's claim that it could have paid the proffered wage from its bank account.

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<sup>1</sup> The Petitioner cites a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum) and states that additional evidence such as bank statements "must be considered" by USCIS. See Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004), <http://www.uscis.gov/laws/policy-memoranda>. However, the Yates Memorandum clearly states that acceptance of such documents to establish ability to pay is discretionary:

In certain instances, petitioners may submit a financial statement in lieu of initial evidence and/or additional evidence such as (1) profit/loss statements, (2) bank account records, or (3) personnel records. Under 8 CFR 204.5(g)(2), [USCIS] adjudicators are **not** required to accept, request, or RFE for a financial statement from U.S. employers who employ 100 or more workers to establish ability to pay. Further, regardless of the number of employees the petitioner's employs, [USCIS] adjudicators are **not** required to accept, request, or RFE for additional financial evidence. Acceptance of these documents by CIS is **discretionary**.

*Id.* at 3 (emphasis in original).

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Furthermore, the Petitioner has not shown that the funds reported in its bank statements represent an additional asset that was not reflected in its federal income tax return. It appears that the year-end balance in the bank account was recorded as a current asset in the Petitioner's 2014 Form 1120, since the account balance on December 31, 2014, was \$43,814.77 and the figure for cash entered on line 1 of Schedule L – \$43,857 – was virtually the same. As previously discussed, the Petitioner's current assets were far outweighed by its currently liabilities in 2014. Accordingly, the [REDACTED] statements are not persuasive evidence of an additional financial resource that the Petitioner could have utilized to pay the difference between the wages paid to the Beneficiary and the proffered wage in 2014 and 2015.

The Petitioner's CEO, [REDACTED] asserts that he could pay the balance of the proffered wage owed the Beneficiary out of his own compensation. In his statement dated November 11, 2015, [REDACTED] indicated that he is a founder of the business, owns 36.47222% of the common stock, and determines employee compensation, including his own. [REDACTED] indicated that his annual compensation was \$155,000 in 2014, and \$180,000 in 2015. At the close of his statement [REDACTED] declared that:

I hereby voluntarily elect to reduce my annual compensation by \$50,000 to \$130,000 per year in order to cover part of the proffered wage (\$49,891 per year) not already covered by the Beneficiary's [REDACTED] current wage (\$96,000 per year).

I have reviewed my financial situation and conclude that a reduction of \$50,000 in my compensation to pay the Beneficiary, a valued employee, the proffered wage would not in any way affect my ability to pay my expenses or support myself.

The Petitioner's Form 1120 for 2014, which was signed by [REDACTED] as President of the Petitioner, does not list any figure on page 1, line 12 ("Compensation of officers"). However, on page 1, line 13 ("Salaries and wages") a figure of \$1,005,504 is entered.<sup>2</sup> The 2014 Form W-2 for [REDACTED] records wages, tips, and other compensation of \$155,000 from the Petitioner. The 2015 pay statements for [REDACTED] show that he was paid at the rate of \$15,000 per month and had received a total of \$140,000 through October 2015. Allocated over the entire year, his monthly payments would bring his total wages in 2015 to \$180,000. It is not clear from the record if this salary is fixed by contract, or if [REDACTED] has the corporate authority to voluntarily reduce his salary.

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<sup>2</sup> It appears that none of these payments were for officer compensation. On IRS Form 1120, the instructions require the taxpayer to enter deductible officers' compensation on line 12. On line 13, the instructions require the taxpayer to enter total salaries and wages paid for the tax year. The instructions to line 13 specifically state: "Do not include salaries and wages deductible elsewhere on the return, such as amounts included in officer's compensation..." <http://www.irs.gov/pub/irs-pdf/i1120.pdf> (last visited Aug. 29, 2016).

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The record does not establish that [REDACTED] was willing to forgo \$49,891 of his compensation in 2014, and it does not establish that he had the ability to forgo a large portion of his compensation in 2014 or 2015. [REDACTED] did not specifically state that he would be willing to voluntarily reduce his annual compensation in 2014 by \$49,891 to pay the balance of the proffered wage that year. Further, in 2014, a \$49,891 salary reduction would represent over 32% of his annual salary and in 2015, a salary reduction of \$49,891 would have been nearly 28% of his annual salary. Without evidence of his liabilities, costs of living, assets, or additional sources of income, the record does not establish that [REDACTED] had the ability to forgo a large percentage of his salary from the Petitioner in 2014 or 2015. We find, therefore, that the statement of CEO/President [REDACTED] dated November 11, 2015, does not establish the Petitioner's ability to pay the proffered wage in 2014 and 2015 by reducing the salary of the CEO/President.

The record includes an assessment of the Petitioner's ability to pay the proffered wage by [REDACTED] Ph.D., a professor of accounting at [REDACTED] dated November 11, 2015. The assessment cites the statement of CEO/President [REDACTED] that he elects to reduce his \$180,000 salary by \$50,000 in 2015 to cover the portion of the proffered wage not paid to the Beneficiary, but offers no analysis of the feasibility of this action by [REDACTED] from a personal financial standpoint. [REDACTED] does not indicate whether [REDACTED] has the financial ability to reduce his salary based on his personal liabilities and obligations, nor does he address the fact that [REDACTED] only pledged to reduce his 2015 salary by \$50,000, and did not mention a similar contribution from his 2014 salary. For the reasons discussed above, we find that the ability to pay assessment by [REDACTED] has little probative value in this proceeding.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the Petitioner states that it has been in business since 2010. On the labor certification application, filed in June 2014, the Petitioner stated that it had 34 employees, but on its Form I-140, filed in April 2015, the Petitioner stated that it had only 17 employees. The Petitioner has not explained this 50% decline in less than 1 year. On its federal income tax return for 2014, the Petitioner recorded gross receipts (net of returns and allowances) of \$2,504,256. Based on worksheets appended to the Form 1120, the Petitioner's gross receipts appear to have varied widely prior to 2014. The documentation of record does not show a historic pattern of growth since the Petitioner's incorporation. The Petitioner has not established any uncharacteristic expenditures or losses, and the Beneficiary does not appear to be replacing a former or outsourced service since he is

already employed by the Petitioner in the proffered job. Based on the evidence of record we determine that the Petitioner has not established that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the \$49,891 shortfall between the proffered wage and the wages actually paid to the Beneficiary in the years 2014 and 2015.

Therefore, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of the instant petition up to the present. Accordingly, the petition cannot be approved, and the appeal will be dismissed.

#### B. Minimum Requirements of the Labor Certification

Although not mentioned by the Director in his decision, the evidence of record does not establish that the Beneficiary has met the minimum requirements of the labor certification to qualify for the job offered. The Petitioner must establish that the Beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. *See 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 the Beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification (Part H of the ETA Form 9089) to determine the required qualifications for the position.

In this case, the ETA Form 9089 requires 48 months of experience in the job offered – director of project management (boxes H.3, H.6, and H.6-A), or in an alternate occupation involving solutions architecture and ERP (boxes H.10, H.10-A, and H.10-B) as well as other special skills and requirements described in box H.14. Boxes H.4, H.4-B, and H.9 also state that a bachelor's degree in industrial or operations management, or a foreign educational equivalent, is required. However, box H.14 allows for 2 years of experience as a director of project management or in a related occupation to substitute for a bachelor's degree. Thus, the Beneficiary could qualify for the job offered with 6 years of relevant experience and no bachelor's degree.

Regarding the evidentiary requirement for prior experience, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements

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for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The record includes a series of appointment letters, service certificates, and other documents indicating that the Beneficiary had the following employment history prior to joining the Petitioner in 2011:

- February 23, 1999, to June 14, 2002 – Assistant Engineer – PPC in the Materials Department of [REDACTED] in [REDACTED] India;
- June 17, 2002, to March 13, 2003 – Senior Officer (CMNMMT) for [REDACTED] in [REDACTED] India;
- March 17, 2003, to June 21, 2005 – Senior Engineer with [REDACTED] in Greater [REDACTED] India;
- August 22, 2005, to August 25, 2006 – Associate Business Analyst for [REDACTED] in [REDACTED] India;
- August 28, 2006, to January 4, 2008 – Senior Consultant Presales for [REDACTED] in [REDACTED] India;
- January 7, 2008, to October 9, 2009 – Business Development Manager with [REDACTED] in [REDACTED] India; and
- March 8, 2010, to June 14, 2011 – Solutions Architect with [REDACTED] in [REDACTED] Washington.

While the above letters document more than 11 ½ years of employment, none of the letters provides a specific description of the duties performed by the Beneficiary in the various jobs. Therefore, the letters do not comply with the substantive requirements of 8 C.F.R. § 204.5(l)(3) and do not establish that the Beneficiary had any qualifying experience in the job offered or in one of the alternate occupations described in the labor certification. In any future proceedings, the Petitioner must submit letters from the Beneficiary's prior employers which furnish the detailed job information required in the regulation.

In addition, while 6 or more years of qualifying experience would obviate the need for a bachelor's degree in industrial or operations management, under the terms of the labor certification (box H.14), we note that the Beneficiary does not appear to have a bachelor's degree or a foreign educational equivalent. The documentation of record shows that the Beneficiary has the following educational credentials:

- A Diploma in Mechanical Engineering from the [REDACTED] in [REDACTED] India, awarded on June 30, 1998; and
- A "Post Graduate Diploma in Business Administration" (PGD/BA) with a specialization in "Operations Management" from the [REDACTED] in [REDACTED] India, awarded on February 13, 2007.

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We have consulted the Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). We consider EDGE to be a reliable, peer-reviewed source of information about foreign degree equivalencies.<sup>3</sup> EDGE advises that a Diploma in Engineering in India is awarded upon completion of 3 years of study beyond the Secondary School Certificate (comparable to the completion of 10<sup>th</sup> grade in the United States), and is generally comparable to 1 year of university study in the United States.<sup>4</sup> It is not comparable to a U.S. bachelor's degree. Further, in its section on India, there is an entry for a Post Graduate Diploma (PGD), which describes the credential as awarded upon completion of 1 or 2 years of study beyond the 2- or 3-year bachelor's degree. According to EDGE, a PGD following a 2-year bachelor's degree is comparable to 1 or 2 year(s) of university study in the United States, and a PGD following a 3-year bachelor's degree is comparable to a U.S. bachelor's degree. However, EDGE also cautions that the entrance requirement for a PGD program must be ascertained to distinguish a PGD awarded after a 3-year bachelor's degree from a PGD awarded after a Higher Secondary Certificate (comparable to a U.S. high school diploma).

According to an academic equivalency from [REDACTED] dated June 28, 2010, the Beneficiary's PGD/BA is equivalent to a bachelor's degree in business administration with a concentration in industrial management from an accredited U.S. college or university. This evaluation includes only a cursory analysis of the PGD/BA credential and contains the unsupported assertion that admission to the PGD/BA program at [REDACTED] is based on the completion of bachelor's-level studies. The evaluation does not indicate if the Beneficiary's Diploma in Mechanical Engineering qualified him for admission to the PGD/BA program.<sup>5</sup>

The record does not establish that the Beneficiary holds a bachelor's degree in industrial or operations management, or a foreign educational equivalent. Accordingly, the Beneficiary would need to establish 6 years of qualifying experience to meet the minimum requirements of the labor certification.

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<sup>3</sup> According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in more than 40 countries." *About AACRAO*, <http://www.aacrao.org/home/about> (last visited Aug. 28, 2016). According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." *AACRAO EDGE*, <http://edge.aacrao.org/info.php> (last visited Aug. 28, 2016).

<sup>4</sup> The Beneficiary was born on [REDACTED] and began his courses in Mechanical Engineering in the spring of 1996. Therefore, he was 15 when he started those courses.

<sup>5</sup> USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). See also *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony); *Viraj, LLC v. U.S. Att'y Gen.*, 2014 WL 4178338 \*4 (11th Cir. 2014) (the AAO is entitled to give letters from professors and academic credentials evaluations less weight when they differ from the information provided in EDGE).

### III. CONCLUSION

In accordance with the foregoing discussion, we determine that the Petitioner has not established its continuing ability to pay the proffered wage of the job offered from the priority date up to the present. The Petitioner has also not established that the Beneficiary has met the minimum requirements of the labor certification to qualify for the job offered. The appeal will therefore be dismissed.

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, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. *See* 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 appeal is dismissed.

Cite as *Matter of A-, Inc.*, ID# 17832 (AAO Sept. 12, 2016)