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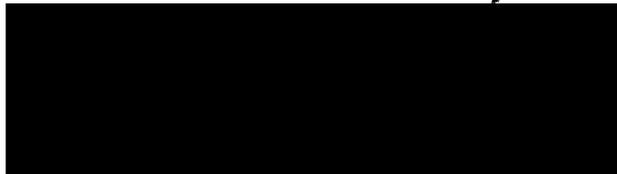
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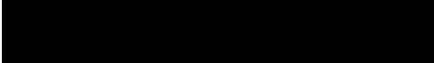
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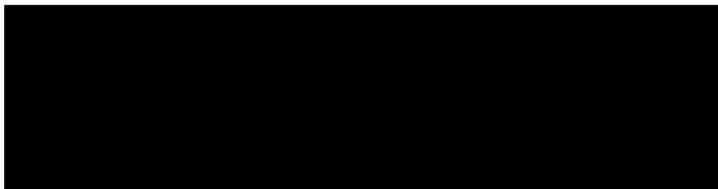


FILE: WAC 03 146 54108 Office: CALIFORNIA SERVICE CENTER Date: **AUG 09 2007**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: On May 5, 2003, the petitioner filed the Form I-129 (Petition for a Nonimmigrant Worker) seeking to extend its authorization to employ the beneficiary as a financial manager pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, California Service Center, denied the nonimmigrant visa petition and the petitioner appealed that decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal on February 23, 2005. Subsequently, the petitioner filed a complaint for declaratory judgment in the U.S. District Court for the Central District of California. *Avi Karpel, A List Limousine Service, Inc. v. United States Department of Homeland Security, et al*, CV 06-07775 (December 7, 2006). Upon review, the AAO, on its own motion, reopened the proceeding to reconsider its previous decision pursuant to 8 C.F.R. § 103.5(a)(5)(ii). The AAO issued a notice and request for evidence on January 25, 2007 and counsel for the petitioner submitted a response, dated June 29, 2007, and received on July 3, 2007. The appeal will be dismissed. The petition will be denied.

The petitioner operates a limousine service and seeks to extend its authorization to employ the beneficiary as its financial manager. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

Upon reopening the matter and a close review of the record, the AAO observed several material inconsistencies within the record.

On January 25, 2007, the AAO requested an explanation or clarification of the beneficiary's status while employed with the petitioner as well as that of [REDACTED] an individual referred to as the petitioner's president. The AAO noted that the petitioner had consistently referred to [REDACTED] as the petitioner's president: on the Form I-129¹ filed May 5, 2003; the letters submitted in support of the petition, dated March 21, 2003 and November 4, 2003; and the Labor Condition Application (LCA), dated March 24, 2003. The AAO noted, in addition, that the petitioner's organizational chart, submitted with the petitioner's November 4, 2003 response to the director's RFE, listed [REDACTED] as the petitioner's president and the beneficiary as the financial analyst, a position shown as subordinate to the position of president. In conflict with these representations made to Citizenship and Immigration Services (CIS), the petitioner represented to the Internal Revenue Service (IRS) that the beneficiary (the 100 percent owner of the business) and [REDACTED] are the petitioner's only officers. Moreover, the IRS Form 941, Employer's Quarterly Tax Return, bears the signature of the beneficiary, on April 26, 2003, as the petitioner's president.² The AAO also informed the petitioner that an Internet search conducted in January 2007 found additional evidence that the beneficiary is employed as the petitioner's president: the California Public Utilities Commission, at [REDACTED].htm, identifies the beneficiary as the petitioner's president, as do the following commercial sites: [REDACTED] and the members section at <http://www.hollywoodchamber.net>. The AAO specifically requested that the petitioner provide corporate

¹ The AAO also noted that the previously approved petition (EAC 01 052 51593), also named [REDACTED] as the petitioner's president on the Form I-129 filed May 10, 2000, the August 1, 2000 letter submitted in support of that petition, and the LCA signed May 10, 2000.

² The California Forms DE-6 (Quarterly Wage and Withholding Report), for the first and third quarters of 2003, do not include an entry for [REDACTED]

records that documented its corporate structure and identify, by name, its officers, and the positions they hold. The January 25, 2007 RFE also noted that the petitioner did not appear to have paid the beneficiary the wage of \$41,000 under the current petition and the wage of \$52,000 under the previously approved petition. The RFE requested wage records from October 1, 2000 through January 7, 2004.

In the June 29, 2007 response, counsel for the petitioner asserts that there are no inherent material inconsistencies in the instant petition or any contradictions with the previous petition. Counsel asserts that a corporate manager and even a shareholder of a corporation may be the beneficiary of a petition without vitiating the beneficiary's qualifications as a *bona fide* employee or professional. Counsel explains that [REDACTED] was previously the petitioner's president. Counsel further explains: "the [Form] I-129 petition erroneously lists [REDACTED] as president when it should have listed him as vice-president. This error was due to a typographical secretarial mistake when the first petition was copied as to signator." Counsel contends: [REDACTED] was authorized to sign the Form I-129 petition; the issue raised by the AAO is irrelevant to the merits of the Form I-129 petition; and that the AAO is acting in a retributive fashion to find any reason to deny the petition because of the federal lawsuit filed.

The assertions of counsel on this issue are not supported by documentary evidence. Neither counsel nor the petitioner submitted the requested corporate records to substantiate that [REDACTED] was at any time the petitioner's president or vice-president. 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). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO does not find credible counsel's explanation that a typographical error regarding the status of Mr. Magril, an individual not substantiated as employed by the petitioner, resulted in [REDACTED] designation of president on the instant Form I-129 and the petitioner's organizational chart. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Rather, the representation of someone other than the beneficiary in the position of president, on more than one occasion, constitutes a misrepresentation of the beneficiary's actual position and the duties associated with the beneficiary's actual position.

The admission in June 2007 that the beneficiary is and has been acting as the petitioner's president raises serious concerns regarding the legitimacy of the petitioner's description of the proposed position. That the petitioner would not disclose the duties of the beneficiary as president undermines the credibility of the remaining evidence in the record of proceeding, including the description of duties to be performed by the beneficiary. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Although a president of a company or a 100 percent shareholder of a corporation in some instances may also perform the duties of a specialty occupation, the petitioner's representation of the beneficiary in a position subordinate to the petitioner's president on its organizational chart is a misrepresentation of the facts of the case or at the very least evidence of the petitioner's lack of forthrightness

regarding the actual duties to be performed by the beneficiary. As the AAO referenced in its initial decision and in the subsequent RFE, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. In this matter, the record does not contain consistent documentary evidence sufficient to conclude that the beneficiary will be employed in the position of financial manager as requested in the extension petition.

The AAO also noted in its January 25, 2007 RFE that the instant petition contained a description of duties for the proffered position that was markedly different from those of the previously approved petition (WAC 01 052 51593). The AAO acknowledges counsel's assertion that the beneficiary's duties in the proposed position are not dissimilar to the duties outlined in the previously approved petition, but rather have increased in depth and responsibility due to the petitioner's growth. However, the AAO finds that the description of duties in the previously approved petition do not correspond to the duties³ of a financial manager and are too general to consider as comprising the duties of any specialty occupation. The AAO is unable to conclude that the duties of the proposed position in the instant petition are similar to the previously vaguely described duties. Further, as the petitioner admits that the beneficiary is now the petitioner's president, the beneficiary is presumably performing the managerial duties of an operations manager/top executive, in addition to the generally described duties he may have previously performed, which constitutes a material departure from his previous position. Furthermore, as noted in the January 25, 2007 RFE, the offered salary of the current petition is \$11,000 less than that offered to the beneficiary in the previous petition, which constitutes a material change in the terms and conditions of employment. As such, the AAO is unable to conclude that the position offered in the instant petition is a continuation of previous employment without change.

In addition, as the AAO stated in its February 23, 2005 decision, prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged

³ The petitioner described the duties of the position in WAC 01 052 51593 as: developing short term and long term strategy to achieve the company's objectives; supervising all financial and accounting functions; reviewing and revising, as needed, the company's fiscal plans and policies; preparing financial reports to summarize the company's financial position, which includes income statements, balance sheets, and analysis of future earnings and expenses and purchasing or leasing additional fleet or upgrade of existing fleet is determined by this critical financial report. This general overview of a position does not provide sufficient information regarding the specific duties and responsibilities to be performed by the beneficiary in relation to the petitioner's particular business interests. The AAO finds that approval of a petition with such a limited description is erroneous and upon proper notice could be subject to revocation.

errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The AAO finds that the petitioner has not presented evidence or clarifying information regarding the material inconsistencies noted in the AAO's January 25, 2007 RFE pertaining to the beneficiary's actual position for the petitioner and the similarity of the beneficiary's actual duties to the previously approved petition. The petitioner has not resolved these material inconsistencies in the record. For this reason the petition will be denied.

As the AAO observed in its January 25, 2007 RFE, a proffered position is not established as a specialty occupation based on its title or how closely a description of the position follows the discussion of an occupational title in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. Rather, specialty occupation status must be substantiated by the evidence of record and demonstrate the actual performance requirements of the position in the context of the petitioner's particular business. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. Section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1). In the instant matter, the evidence of record must establish that the performance of the duties of the proffered position requires the theoretical application of a body of highly specialized financial management knowledge and the attainment of at least a bachelor's degree, or its equivalent, in finance, accounting, economics, or business administration. In this matter the record, including the petitioner's response to the AAO's January 25, 2007 RFE, does not contain this necessary evidence.

To meet its burden of proof that the proffered position is a specialty occupation, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner's November 4, 2003 reply to the RFE provided the following description and estimated percentage of time to be expended for the proffered position of financial manager:

- Evaluate new services; manage the flow of cash receipts and disbursements; investment in capital equipment. Constantly monitor the option of purchase against leasing, when to rotate the fleet; monitor the insurance expense and conduct cost analysis; compare monthly sales, annual sales, and other financial data to previous years; point out low periods in order to prepare accordingly in regards [sic] receivables and/or other relate[d] purchases by using tools of Stack Charts, Pie Charts on computer software programs. (60%)
- Accurately identify, diagnose and resolve complex issues regarding feasibility of expansion programs to achieve projected growth target. Our company is looking to expand not only through our current sales force but also through mergers or acquisition. It requires the financial manager to analyze financial data, possible mergers or buyout of other companies; [and] negotiate with financial institutions such as bank[s] and [the] SBA. (40%)

In the AAO's January 25, 2007 RFE, the AAO noted the above duties and requested that the petitioner supplement the record with evidence to establish that the performance of the beneficiary's duties, which are only generally described in the record, require the application of the level of highly specialized knowledge that characterizes a specialty occupation. To demonstrate this, counsel attached several documents to the response to the RFE including:

An undated, unsigned business plan to purchase another limousine service, to purchase property, and refinance the petitioner's existing fleet of six limousines with a cost analysis;

A December 12, 2002 bank commitment letter to purchase real estate and to acquire a business, subject to SBA approval addressed to the beneficiary at the petitioner's business, with a signature line for the beneficiary to sign as president and as guarantor;

A January 22, 2003 bank letter requesting information in order to evaluate the petitioner's credit request addressed to the beneficiary at the petitioner's business;

A February 11, 2005 bank letter requesting information in order to prepare a commitment letter addressed to the beneficiary and the petitioner;

A February 18, 2005 bank letter expressing interest in providing financing for a business acquisition addressed to the beneficiary at the petitioner's address;

An April 22, 2005 bill of sale selling a limousine business to the petitioner;

A loan agreement effective August 11, 2006 between the petitioner and a bank signed by the beneficiary as president;

A July 18, 2006 letter and an August 8, 2006 letter from a non-profit development lender to the beneficiary at the petitioner's address, informing the petitioner its SBA 504 loan had been received and approved and an August 2, 2006 attachment informing the petitioner additional data was needed to satisfy loan conditions; and,

Copies of several car leases beginning in January 2003 signed by the beneficiary as president of the petitioner.

Counsel asserts that these documents demonstrate the financial growth and aggressiveness of the petitioner and the day-to-day financial responsibilities of the beneficiary. Specifically counsel asserts that the beneficiary: conducted economic analysis and due diligence on behalf of the petitioner, was involved in technical negotiations, and prepared the documents for the bank in order to obtain the December 12, 2002 bank commitment letter to acquire a limousine service in 2002; conducted due diligence, verified the seller's accounting records, was involved in technical negotiations, and prepared documents for the bank in order to obtain a bank commitment letter that resulted in the consummation of a deal on April 22, 2005; used his financial and economic acumen and knowledge to conclude that purchasing used vehicles would not diminish company efficiency or service and would save the company money; and, evaluated the economic feasibility of purchasing a building rather than continuing to rent.

Counsel's assertions are not persuasive. Again, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S.

183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503. The documents submitted demonstrate that the beneficiary is and has been involved in operating a business, similar to the duties of a top executive as described in the Department of Labor's *Handbook*. The *Handbook* reports: "[a]ll organizations have specific goals and objectives that they strive to meet. Top executives devise strategies and formulate policies to ensure that these objectives are met." The *Handbook* also notes that the nature of high-level executives' responsibilities depends on the size of the organization and that in smaller organizations, a partner, owner, or general manager often is responsible for purchasing, hiring, training, quality control, and day-to-day supervisory duties. The *Handbook* also includes the occupation of chief financial officer in its report on top executives and indicates:

Chief financial officers direct the organization's financial goals, objectives, and budgets. They oversee the investment of funds and manage associated risks, supervise cash management activities, execute capital-raising strategies to support a firm's expansion, and deal with mergers and acquisitions.

The AAO finds the petitioner's general description of the beneficiary's proposed duties accompanied by the documents presented in response to the January 25, 2007 RFE, are indicative of an individual who is managing a business and striving to make that business successful. The attendant responsibilities of making decisions regarding the successful operation of a business require business acumen but do not necessarily require the theoretical and practical application of a body of highly specialized knowledge attained through a four-year course of study at the university level in a specific discipline. As the *Handbook* reports: "[t]he formal education and experience of top executives vary as widely as the nature of their responsibilities," and further:

Many top executives positions are filled from within the organization by promoting experienced, lower-level managers, when an opening occurs. In industries such as retail trade or transportation, for instance, it is possible for individuals without a college degree to work their way up within the company and become managers.

The petitioner has not provided a description or documentation demonstrating that the decision making skills involved in the operation of the petitioner's limousine business are skills that require the theoretical and practical application of a body of highly specialized knowledge. Although specifically requested by the AAO, the petitioner has not submitted any documentation describing its new services, the actual duties involved in managing the flow of cash and disbursements and investment in capital equipment, or other evidence that the skill level of the beneficiary's analysis and decision making requires the theoretical and practical application of a body of highly specialized knowledge. In the matter at hand, the petitioner has not established that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position. The petitioner has not established the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The record does not include any evidence from professional associations regarding an industry standard or documentation from other sources that establishes a degree requirement in a specific discipline is common to the industry in parallel positions among similar organizations. Neither has the petitioner shown that the proffered

position is so complex or unique that only an individual with a degree can perform the work associated with the position. Again, although the AAO requested that the petitioner articulate the complexity of the proffered position, the petitioner has failed to do so. The petitioner has not submitted evidence to distinguish the proffered position from similar but non-degreed employment. The record does not establish that the nature of the specific duties of the proposed position is more complex or unique than that of any owner/executive of a transportation business, a position that does not normally require a degree or knowledge usually associated with the attainment of a bachelor's or higher degree in a specific discipline. The petitioner has not established the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Neither counsel nor the petitioner presents evidence of the petitioner's past employment practices. The AAO also notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F.3d at 384. The petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Finally, the AAO turns to the criterion 8 C.F.R. § 214.2(h)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As determined above, to the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The petitioner has not provided sufficient documentary evidence that the duties of the proffered position contain elements different from that of a generic operations manager/executive involved in the financial and budgetary issues of its business. Neither does the position, as described and documented represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a typical operations manager/executive attempting to have his or her business succeed. Although an executive is required to make decisions involving skill and business knowledge regarding investments, purchases, rent, expenses, and whether to expand, these duties have not been shown in the current record solely or when considered together to comprise the duties of a financial manager or any specialty occupation. Without an articulated list of duties and description of the complexity and specialization of the skills involved that relate to the petitioner's specific business operations, the petitioner has not established that the proffered position is a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, the AAO notes that the petitioner has not established that it paid the beneficiary the prevailing wage during the first year of the extension petition, which precludes approval of the petition. The January 25, 2007 RFE requested wage records from October 1, 2000 – January 7, 2004, the date the extension petition was denied. The petitioner failed to submit a response for 2003. 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). The petitioner has not established that it paid the beneficiary the prevailing wage during the first year of the extension petition, as requested in the RFE.⁴

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2) requires the petitioner to state that it will comply with the terms of the LCA for the duration of the alien's authorized period of stay. The petitioner's failure to pay the beneficiary the prevailing wage from May 5, 2003 through the end of the year shows the petitioner has failed to comply with the current LCA. The petitioner has not established that it complied with the terms of the LCA in 2003 by paying the beneficiary the prorated prevailing wage of \$42,000. For this additional reason, the petition will not be approved.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation, to resolve material inconsistencies in the record, and to establish that it complied with the LCA requirements in 2003. Accordingly, the AAO's February 23, 2005 decision is affirmed. The petition is denied, with each of the aforementioned grounds considered as an alternative grounds for denial.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The February 23, 2005 decision of the AAO is affirmed. The petition is denied.

⁴ The petitioner also failed to establish that it paid the beneficiary the prevailing wage under the previously approved petition. The petitioner stated in response to the January 25, 2007 RFE that his total salary in 2001 was \$33,800, but that he was not employed full-time in 2001, and an hourly review would demonstrate payment of the wage well over the proffered salary of \$52,000. The petitioner did not submit an hourly review of the beneficiary's wage in 2001 and did not address the beneficiary's wages in 2002 or 2003. The failure of the petitioner to pay the beneficiary the prevailing wage as promised on the LCA is an appropriate grounds for revocation of the previously approved petition on notice under 8 C.F.R. § 214.2(h)(11)(iii)(3).