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U.S. Department of Justice

Immigration and Naturalization Service

identification data deleted to prevent clearly unwarranted invasion of personal privacy.

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 98 070 53927 Office: California Service Center Date: 19 MAR 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability in the arts. The petitioner seeks employment as a musician/music instructor. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as an alien of exceptional ability, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director found that the petitioner qualifies as an alien of exceptional ability in the arts. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit"

> [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner holds a bachelor's degree in musical composition from the Shanghai Conservatory of Music in China. At the time of filing, the petitioner was pursuing a master's degree in composition at Mills College. Counsel indicates that the petitioner "has been offered a job teaching composition and directing musicals at the Academy of Chinese Performing Arts in Fremont, California." Counsel states that the petitioner will serve the national interest through improving educational programs and cultural awareness.

Counsel describes the petitioner as "a top-notch composer" and "a creative and accomplished music teacher." Counsel states that the Academy of Chinese Performing Arts, the school where the petitioner aspires to teach, serves "primarily Asian-American students and is staffed primarily by first-generation Chinese immigrants." Counsel indicates that the petitioner's "innovative instructional methods are the ideal vehicle through which to enable these children to assimilate the best of a new country without losing what their parents brought with them from the old." Counsel adds that the petitioner "possesses the skills of a professional musician, composer and recording engineer, the ability to communicate with students whose native languages are not English, and an impressive track record as a teacher."

Counsel describes how the petitioner will improve cultural awareness:

> [The petitioner's] prospective students, those at the Academy of Chinese Performing Arts, perform traditional Chinese music at elementary schools around the San Francisco Bay area. [The petitioner's] contributions to cross-cultural understanding will help children from all walks of life understand where their peers are coming from... [The petitioner] is one of a very select group of artists who can act as a bridge between cultures.

The petitioner submits several witness letters. Chris Brown, Head of the Music Department of Mills College, describes the petitioner as "a top student in the department." He further describes the petitioner as a "gifted composer" and "experienced music educator."

Pauline Oliveros, Visiting Professor at Mills College, discusses the petitioner's musical education in China and describes the petitioner as "a truly unique and outstanding musician who successfully harmonizes oriental music with Western music." She adds: "I firmly believe that [the petitioner] has a very bright future ahead of him and that his continued presence in the United States will enable him to contribute greatly to multicultural understanding in this country."

David Chen, President of the Academy of Chinese Performing Arts, in Fremont, California, describes the petitioner's musical education and career in China:

> [The petitioner] is a gifted musician. Born in 1963 to a musician's family, he began to study piano at an early age, and then composition and music theory from his father, one of China's celebrated composers and directors. In 1978, he was admitted to the Department of Shandong Academy of Art, majoring in composition and piano. Then in 1982, he was enrolled in the prestigious Shanghai Conservatory of Music, studying composition from Professor Chen Gang, one of the most outstanding composers in China. Upon graduation in 1987, he was asked to teach at the Conservatory. Because of his outstanding performance, he was appointed by other music institutions and companies as either visiting composer or consultant, and was invited to give music lectures on Orchestration on China Central TV Station, China's largest TV station broadcast nationwide with an audience of hundreds of millions. The lecture has received such good reviews it was later broadcast in Southeast Asian countries and is now being extensively used as a music textbook for music institutions in China. In recognition of his achievement, he was promoted to the rank of Lecturer by the Conservatory in 1991, becoming the youngest lecturer ever promoted to the position in the history of the institute. During this time, he also received honors and awards for his works. Last year, he came to the United States to study composition for his Master's Degree from the well known composer, P. Oliveros.
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> [The petitioner] is a productive and versatile composer with extraordinary ability. He has produced and published many CDs and music tapes. His works include piano music, art songs, interior music, electronic music, movie and TV music, and concertos and symphonies, some of which have been performed in China, directed by American Director Vincent de Frank, and Chinese directors Cao Peng and Zhang Guoyong.
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> What is unique about [the petitioner's] music style is that his music preserves a distinct Oriental flavor while showing a trace of Western music. This can be done only by someone with a good mastery of his specialty and a rich experience of both cultures. This is significant as the coming 21st century will see more cultural exchange between the East and West, which will surely promote the understanding between the two worlds.

Dun-Zhi Zhang, Vice-Chairman of the Shanghai Association of Musicians and Professor at the Shanghai Conservatory of Music, also describes the petitioner's musical education and career in China:

> His unique background has helped mold him into a very unique and exceptional musician. He was born into a musician's family. Under the guidance of his father, a famous composer and conductor in China, he started learning piano, composition and musical theory at a very early age. He was admitted into the Music Department of Shandong Art Institute to study composition and piano when he was only 15 years old. In 1981 he became the resident composer of Jinan Folk Art Ensemble in China. In 1982 he was admitted with top grades to Shanghai Conservatory of Music where he received excellent and systematic music education. Because of his demonstration of outstanding talent as a student, he was retained in 1987 to be the youngest assistant teacher in the Composition and Conducting Department of Shanghai Conservatory of Music. He has taught students both theory and application of such courses as *Solfeggio, Harmony, Orchestration, Chinese Music, Electronic Music, and Composition.* He not only elaborately explained the fundamental elements of music, the appropriate application of creative and performing techniques, the trends and changes of music styles, but also touched the subject of music aesthetics, public reception psychology, and the mutual permeation and influences of the Eastern and Western cultures which comprised of [sic] the essential parts of training a musician. [The petitioner] did profound research in these respects. In addition to the modern mass media teaching methods such as the projector, CD, and video, he brought the students to attend various concerts and to go to the recording companies in order to get personally involved in whole musical production procedures. His teaching method stimulated students' creative enthusiasm and brought about vital changes to the then rigid mono-teaching method. The innovative teaching method greatly enhanced our teaching standard in China and is starting to be employed in other music higher learning schools in our country.
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> Apart from his professional music education, [the petitioner] also dedicated himself to the popularization and enhancement of music education of the whole society. He participated in the lecture group organized by the National Education Committee and trained a lot of music teachers for elementary and middle schools all over the country. By enhancing their music quality, [the petitioner] created more employment for them. [The petitioner] was also invited by Shanghai Music Station to host a lecture program on Channel 101.1 with a coverage of hundreds and thousands of listeners.
>
> Because of his distinguished achievement and contribution, we made an exception in 1991 to promote him to be a lecturer of Shanghai Conservatory of Music, a very great honor at our institute. Later on he was placed in the positions of the Teaching and Researching Section Director for Orchestration, Director of Electronic Music Studio, and committee member of Composition and Conducting Department. Finally, he became the leader of music branches in the school and a member of Shanghai Association of Musicians. He also set up the first high standard electronic music studio in Shanghai City in our school. In

> 1992, the China National TV Station and the Central TV Station invited first-class specialists, professors, scholars to host a Satellite Television Music Education Series Courses including vocal music, piano, opera, Chinese national music, composition and music theory. Because of his irreplaceable position in the field of music, [the petitioner] was honored with the invitation to broadcast the series "Orchestration," which was broadcast to China and Southeastern Asia through the satellite over Indian Ocean. That was the first and the largest scale of art education that was ever held in China. The set of courses has become the standard textbook and was widely used all over China. In 1994, [the petitioner] was invited by Shandong Opera and Dance Theatre as a first class composer which was the equivalent to that of a professorship.
>
> [The petitioner's] music is unique because he, more than any other musician in our country, can combine high-tech tools with a foundation in traditional Chinese music to make a synthesis that is very moving without being shallow or pretentious. [The petitioner] is the master of the art of modern musical eclecticism.

The petitioner submits additional letters from Gang Chen, another professor at the Shanghai Conservatory of Music, and Neng-Xue Xu, General Manager of Shanghai Sound and Vision Corporation, where the petitioner worked as a composer. These letters repeat the petitioner's musical qualifications and further describe his abilities as an accomplished conductor and composer. On appeal, the petitioner submits a letter from David Pang, Program Director at Chinese Star Radio in San Francisco, a non-profit radio station serving Chinese-speaking listeners. David Pang first met the petitioner in 1998 and includes the petitioner's music in the station's programming selection. David Pang describes the petitioner's "Orchestration" series that appeared on Chinese television as a "music appreciation" course for mass distribution throughout China. He also mentions the petitioner's skills as a composer and producer in using computer techniques to remix religious hymns.

In addition to the testimonial letters, the petitioner submits his educational credentials, an employment verification, various program listings reflecting the petitioner as a pianist or conductor, program brochures reflecting that the petitioner's musical compositions were played, four color photographs alleged to reflect the petitioner's involvement in television lecture series, copies of three certificates of honor won by a student of the petitioner, and copies of twenty-seven cover pages for various compact discs and tapes produced by the petitioner. This documentation clearly reflects the petitioner's exceptional ability as musician/music instructor.

However, in accordance with the statute, exceptional ability is not by itself sufficient cause for a national interest waiver. The benefit that the petitioner presents to his field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F). A petitioner seeking a national interest waiver must persuasively demonstrate that the national interest would be adversely affected if a labor certification were required for the alien. The petitioner must demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making available to U.S. workers the position sought by the alien. The labor certification process exists

because protecting the jobs and job opportunities of U.S. workers having the same objective minimum qualifications as an alien seeking employment is in the national interest. An alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process.

Stated another way, the petitioner, whether the U.S. employer or the alien, must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. It cannot suffice to state that the alien possesses useful skills, or a "unique background." As noted previously, regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process. Likewise, it cannot be argued that an alien qualifies for a national interest waiver simply by virtue of playing an important role in a given project, if such a role could be filled by a competent and available U.S. worker. The alien must clearly present a significant benefit to the field of endeavor.

The witness letters submitted only briefly discuss the petitioner's involvement in the China Central TV Station's "Orchestration" series. David Chen states: "The lecture has received such good reviews it was later broadcast in Southeast Asian countries and is now being extensively used as a music textbook for music institutions in China." However, other than the four color photographs submitted, only one of which shows the petitioner, no further evidence was offered to support this claim. The record contains no evidence from the Chinese mass media reflecting these "good reviews" or proof that the petitioner's series is widely used throughout China and as a "music textbook."

The guidelines set forth in Matter of New York State Dept. of Transportation and the construction of the regulations demonstrate the Service's preference for verifiable, documentary evidence, rather than subjective opinions from witnesses selected by the petitioner. The letters submitted by the petitioner are primarily from his teachers, professors and colleagues at Mills College and the Shanghai Conservatory of Music. The remaining letters are from a former musical collaborator, the petitioner's prospective employer, and the program director at Chinese Star Radio, a station serving "San Francisco's Chinese-speaking listeners." Many of these individuals describe the petitioner's skills as a gifted musician and instructor, but offer no evidence of his specific achievements and contributions having a potential to impact the United States. The witness letters essentially limit the petitioner's impact to his students at the Academy of Chinese Performing Arts in Fremont, California, and in a much less direct sense, the audiences of their performances and the radio listeners of Chinese Star Radio in San Francisco. The petitioner has failed to demonstrate how his influence as a musician/teacher, which appears limited to the Chinese-speaking community of the San Francisco Bay area, is national in scope.

We note that the record reflects little formal recognition or awards for the petitioner's work as a musician or teacher, arising from various groups taking the initiative to recognize the petitioner's contributions, as opposed to private letters solicited from selected witnesses expressly for the purpose of supporting the visa petition. Independent evidence from outside the petitioner's

community and academic institutions which would have existed whether or not this petition was filed is more persuasive than subjective statements from individuals with an expressed interest in the petitioner's continued employment and involvement in community projects.

The director denied the petition, stating that the evidence submitted did not support a finding that it would be in the national interest to waive the job offer requirement. The director noted that the evidence was insufficient to demonstrate that the petitioner was likely to have an impact on more than "an extremely limited segment of the United States public."

On appeal, counsel notes a discrepancy in the director's decision regarding the exceptional ability finding. In the fourth paragraph of the decision, the director offers a discussion of the evidence submitted and concludes that the petitioner satisfies the regulatory criteria under 8 C.F.R. 204.5(k)(3)(ii). However, the last paragraph of the director's decision erroneously states: "In conclusion, the evidence is found insufficient to establish that you are of exceptional ability." We concur with counsel's conclusion that this statement appears to be a typographical error. While the wording of the director's decision may be improved, it is by no means so flawed as to undermine the underlying basis for the denial.

Counsel argues that the director's decision was arbitrary and unsupported by case law. However, we find that the director's conclusions were supported by the guidelines set forth in Matter of New York State Dept. of Transportation. Counsel states that the petitioner's employment offer as a teacher of musical composition demonstrates his ability to improve educational opportunities available to children. Counsel offers a discussion regarding the overall importance of musical education to a child's intellectual development and the value of bilingual Chinese music teachers. In support of the appeal, counsel submits an article from *USA Today* entitled "Music lessons may open mind to math, science." This article does not even mention the petitioner; it merely states that "music lessons appear to strengthen the links between brain neurons and build new neural bridges needed for good spatial reasoning."

Pursuant to published precedent, the overall importance of a given occupation is insufficient to demonstrate eligibility for the national interest waiver. While the Service acknowledges the importance of the musical and teaching professions, eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. While benefiting our nation's culture through musical education is an important national issue, it does not follow that every individual who works for this goal has made significant achievements and contributions in their field. Counsel's arguments regarding the overall importance of educators and gifted artists do not single out the petitioner for the special benefit of a national interest waiver. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987). By asserting that employment as a teacher or musician inherently serves the national

interest, counsel for the petitioner essentially contends that the job offer requirement should never be enforced for these occupations, and thus this section of the statute would have no meaningful effect.

In regards to the petitioner's specific teaching efforts, the letters essentially limit his impact to students at the Academy of Chinese Performing Arts in Fremont, California. They fail to demonstrate sufficient evidence of the petitioner's achievements and significant contributions to the field of musical education as a whole. The petitioner's impact on the national interest as a music teacher would be so attenuated at the national level as to be negligible. For example, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for the purposes of waiving the job offer requirement. We do not dispute that the petitioner's various lectures yielded positive results in the training of music teachers in China, but his teachings have not been shown to have attracted significant attention from prominent educators in the field outside of the petitioner's educational institutions. The record does not establish the extent to which other educators and instructors in the musical field have relied upon the petitioner's teaching methods as a model, or that the petitioner has developed an original method that represents a significant improvement upon existing methods of instruction. The petitioner's use of a film projector, compact discs and videos, along with taking students to concerts and recording companies in an effort to get them more personally involved in musical production procedures, does not reflect a breakthrough method of instruction. It could easily be argued that the majority of music teachers use audio-visual materials and take their students on field trips. Such practices do not set the petitioner apart from others in the field.

On appeal, counsel offers further discussions as to how the petitioner will improve the cultural interests of the United States. Counsel notes that the petitioner was one of the first composers in China "to employ new technology, such as synthesizers, samplers, computers, and musical instrument digital interfaces, which convert computer-generated digital sounds into musical sounds, in the composition of traditional Chinese music." However, "employing" new technologies developed by others does not carry the same weight as actually developing or inventing new technologies. While the petitioner has provided evidence of twenty-seven cover pages for various compact discs and tapes he is alleged to have produced, no evidence has been submitted to demonstrate their commercial success in China. These compact discs and tapes may reflect his competence and experience as an orchestral arranger or conductor, but do not set him apart from others in the field. It should be noted that the petitioner has not provided evidence of any awards recognizing his role in these productions. Nor has it been established that these productions represent the petitioner's own original artistic contributions. For example, Exhibit J., Music of England- Series of World Music, features songs such as "Danny Boy" and "When Irish Eyes Are Smiling." The significance of the petitioner's efforts as a producer is not clear given that many of the twenty-seven cover pages for the compact discs and tapes appear to be reproductions of other artists' music.

Counsel states that the petitioner's impact spread beyond China when his educational television series, "Orchestration," was syndicated elsewhere in Asia. Counsel has failed to offer documentary evidence to support this claim. The assertions of counsel do not constitute evidence.

Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Counsel further states: "...the unusually broad impact the petitioner had in China and the Far East provides persuasive evidence that the petitioner is likely to have an impact on more than a extremely limited segment of the United States public." This assertion is entirely speculative. It has not been established how the petitioner's prospective employment, the musical instruction of a limited number of Chinese-speaking children in Fremont, California, serves the national interest of the United States.

All of the witnesses provided by the petitioner are his personal acquaintances, colleagues, or former educators. These individuals say little apart from discussing the petitioner's skills as a musician and describing him as an effective instructor and capable musical composer. The petitioner's skill as a musician and teacher, while appreciated at his educational institutions, does not appear to represent a national interest issue. Further, while many of the testimonial letters describe the future promise of the petitioner with phrases such as "will contribute" and "has a very bright future ahead of him," the evidence submitted is insufficient to demonstrate a past record of significant achievements and contributions to the field of music/musical instruction which set him above others in the field.

Counsel notes the testimonial from David Pang mentioning the petitioner's volunteer work with the children of the Shanghai City Children's Chorus and the Academy of Chinese Performing Arts. However, the petitioner's impact is essentially limited to his students. The petitioner must clearly establish, in some capacity, the ability to serve the national interest to a substantially greater extent than the majority of his colleagues in the musical profession. The Service here does not seek a qualified threshold of experience or education, but rather a past history of demonstrable achievement with some degree of influence on the field as a whole. The petitioner has failed to show that his work has attracted the attention of major musical teacher associations or comparable bodies, or major trade publications which, one would expect, report the development of valuable new musical instruction methods.

At issue is whether this petitioner's contributions to the musical profession are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. Without evidence that the petitioner has been responsible for specific significant achievements in the field of music, we must find that the petitioner's assertion of prospective national benefit is speculative at best.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

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

ORDER: The appeal is dismissed.