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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **AUG 25 2006**
EAC 05 199 52364

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[REDACTED]

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: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a custom glazing company. It seeks to employ the beneficiary permanently in the United States as glass engraver. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel states that the director's decision is incorrect as the AAO permits petitioners to include depreciation and corporate checking account statements in the examination of the petitioner's ability to pay the proffered wage. Counsel states the totality of the petitioner's circumstances should be considered. Counsel submits further documentation.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 6, 2001. The proffered wage as stated on the Form ETA 750 is an hourly salary of \$17.93 an hour, or an annual salary of \$37,294.40. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1980, to have two employees, and did not identify its gross or net annual income. In support of the petition, counsel submitted the petitioner's Forms 1120S for tax years 2001, 2002, and 2003. Counsel also submitted the petitioner's monthly bank accounts statements for the same three years, as well as copies of previous AAO decisions that allowed the use of petitioner's corporate banking statements and the use of the petitioner's depreciation expenses when evaluating the petitioner's ability to pay the proffered wage. In a cover letter, counsel examined the petitioner's 2001, 2002, and 2003 federal corporate income tax returns and noted that in tax year 2001, the

petitioner had an ordinary income of \$24,511, \$1,130 available in cash and \$12,978 in depreciation. Counsel stated that these amounts totaled \$14,288 from which \$1,219 in other current liabilities had to be deducted to arrive at the petitioner's current assets of \$12,969.¹ Counsel also referred to a previous unpublished AAO decision and stated that the petitioner's average monthly balance of \$38,958 in its banking account could have been used to pay the beneficiary's monthly wage of \$3,107.887. Counsel also submitted copies of three other AAO decisions in which corporate bank statements were accepted as evidence that the petitioner had sufficient funds with which to pay a proffered wage. With regard to the petitioner's tax returns for tax year 2002 and 2003, counsel stated that the petitioner had \$23,354 available to pay the proffered wage in 2002 and a monthly bank account average of \$27,316 which also could have been used to pay the beneficiary's monthly wage of \$3,107.87. With regard to tax year 2003, counsel noted that the petitioner had \$6,038 in available cash, and \$16,060 in depreciation expenses, and that when these two figures were combined and then other current liabilities of \$1,937 were deducted, the petitioner had \$20,161 available to pay the proffered wage in tax year 2003. Counsel also noted that the petitioner's 2003 bank statements showed a monthly average of \$19,787.10, which could have been used to pay the proffered monthly wage of \$3,107.87.² In total, counsel submitted four previous unpublished AAO decisions that either allowed the use of corporate bank accounts or the use of depreciation expenses in establishing the petitioner's ability to pay a proffered wage.

On January 6, 2006, the director denied the petition. In his denial of the petition, the director examined the petitioner's tax returns for 2001, 2002, and 2003. The director noted that the petitioner's ordinary income in 2001 was \$24,511 and the petitioner's current liabilities³ exceeded its current assets by \$1,391. The director noted that the petitioner's 2001 tax returns showed ordinary income of \$7,262 and that its current liabilities exceeded its current assets by \$2,360. With regard to the petitioner's 2003 corporate tax return, the director noted that the petitioner had ordinary income of -\$2,559 and that the petitioner's current liabilities exceeded its current assets by \$1,937. The director then stated that these tax figures did not show the petitioner had the ability to pay the proffered wage based upon ordinary income alone nor did the Schedules L balance sheets reflect that the petitioner had sufficient net current assets to make up the difference between the petitioner's ordinary income and the proffered wage. The director further noted that the majority of the petitioner's assets were tied up in equipment and buildings and were not liquid assets. The director also noted that two of the petitioner's three tax returns did not reflect that the petitioner had paid any salaries. Finally the director noted the petitioner bank statements submitted to the record as further evidence that the petitioner had the ability to pay the proffered wage. The director stated that the bank statement did not show that an ongoing use of the banking funds would allow the petitioner to pay the beneficiary's proffered wage, as once the bank funds were used to pay the wage, the bank funds were not longer available to the petitioner.

¹ The record is not clear as to how counsel arrived at some of the figures noted in his cover letter. Contrary to counsel's calculations, the petitioner's combined taxable income, available cash and depreciation expenses in 2001 totaled \$38,799. If the petitioner's other current liabilities of \$1,319 listed on Schedule L were subtracted from this figure, the resulting figure would be \$37,480. However, the AAO will examine the use of depreciation expenses and the calculations of the petitioner's net current assets more completely further in these proceedings.

² Counsel failed to note the petitioner's ordinary income of -\$2,559 in tax year 2003.

³ Although the director did not explicitly note this, the petitioner's current assets and liabilities are identified on the petitioner's Schedules L Balance Sheet.

On appeal, counsel states that the petitioner does have the ability to pay the proffered as of the 2001 priority date year, and further contends that a totality of circumstances should be taken into consideration when considering the merits of the instant petition.

Counsel submits the following documentation:

An affidavit by [REDACTED] the petitioner's president. [REDACTED] explains the specialized nature of the beneficiary's skills in copper wheel engraving, and that the beneficiary's skills in this area would allow the petitioner to expand its business. [REDACTED] states that presently only he and his wife work for the petitioner. [REDACTED] states that the petitioner loses approximately \$100,000 because although [REDACTED] can perform the copper wheel engraving, he cannot both do the engraving and run the business.

Articles taken from the Internet with regard to copper and diamond-wheel engraving in Hungary, and at Steuben Glass in Corning, New York, and a detailed description of a 1800 circa wine decanter and its auction value.

Copies of *Sonegawa* and six unpublished AAO decisions. The AAO decisions examine two petitions involving multinational executives and managers in which the petitioner established its ability to pay the proffered wage based on an examination of the petitioner's taxable income, depreciation, and cash on hand at the end of the year. The other unpublished AAO decisions either examined the use of corporate bank accounts or depreciation expenses in establishing the petitioner's ability to pay the proffered wage, which is not germane to the present proceedings or the totality of the petitioner's circumstances in which uncharacteristic events such as a harsh hurricane season occurred.

The petitioner's tax returns for tax years 2001, 2002, and 2003 accompanied by corporate bank statements. Counsel submits new bank statements for the period of time of January 2003 to December 2004.

Counsel asserts that *Sonegawa* stands for the proposition that income tax returns can be supplemented by other evidence of future viability, including a financial formula that involves adding taxable income, depreciation and cash (to the extent the assets exceed liabilities) to determine the total amount that could be used to pay the proffered wage. Counsel further asserts that based on the AAO decisions submitted to the record, the AAO permits petitioners to include depreciation expenses and corporate checking account statements to establish that the petitioner has the ability to pay the proffered wage. Counsel cites *Davila-Bardales v. INS*, 27 F. 3d (1st Cir. 1994) in stating an agency cannot adopt conflicting policies in its decisions.

Counsel reexamined the petitioner's tax returns for 2001, 2002, and 2003 and reiterates that the petitioner had \$37,480 available in 2001 to pay the beneficiary a pro-rated proffered wage of \$27,253.60;⁴ that the petitioner

⁴ Counsel calculated the beneficiary's proffered wage in tax year 2001 from the priority date of April 6, 2001

had \$23,354 available to pay the proffered wage of \$37,294 in tax year 2002, and that the petitioner had \$20,161 available in 2003 to pay the beneficiary's proffered wage. Counsel further asserts that the petitioner's average monthly balances in its bank account for the years 2001, 2002, and 2003 would have been sufficient to pay the beneficiary's monthly wage of \$3,107.87. With regard to tax year 2004, counsel notes that the petitioner's show an ordinary income of \$7,850, available cash of \$1,014 and \$12,727 in depreciation expenses. Counsel states that the petitioner had \$19,613 available to pay the beneficiary the proffered wage, and that the petitioner's average monthly balance of \$14,585.61 was also sufficient to pay the beneficiary's monthly wage of \$3,107.97.

Counsel then asserts that the petitioner's income will increase substantially with the beneficiary's employment and that copper wheel engraving is a lucrative field that will consequently make the petitioner more profitable. Counsel also states that the totality of the petitioner's circumstances be taken into consideration and refers to another unpublished AAO decision that involved a company with negative net profit, whose ability to pay the proffered wage had been upheld by the AAO.⁵

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Furthermore, as correctly noted by the director, if the petitioner were allowed to use its monthly balances to establish its ability to pay either the beneficiary's annual salary or his monthly salary, each time such funds were utilized, the petitioner's available funds would be reduced, and the average monthly bank balance would reflect much lower available funds. Thus, the bank balances are not a suitable manner of establishing the petitioner's ability to pay the proffered wage.

Counsel on appeal and in its initial submission notes previous unpublished AAO decisions that allow both the use of corporate bank accounts and depreciation expenses to establish the petitioner's ability to pay the proffered wage. First, counsel does not provide any published citations for these AAO decisions. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound

at the end of the year, using a weekly salary of \$717.20.

⁵ In this unpublished decision, the petitioner had over 1,350 employees, a gross annual income of 22 million dollars, salaries and wages paid of over 13 million dollars and a declared taxable income loss of approximately \$1,400,000. The AAO determined that the final regulations at 8 C.F.R. § 204.5(g)(2) allowed organizations that employ at least 100 workers to submit a statement from a financial officer relevant to the petitioner's ability to pay the proffered wage. The AAO then examined the petitioner's longevity, the number of its employees, its annual gross income of over 22 million in 2001, its salaries and wages expenditures and determined that, within the totality of the petitioner's circumstances, the petitioner did have the ability to pay the proffered wage, despite its negative ordinary income.

volumes or as interim decisions. 8 C.F.R. § 103.9(a). Second, based on the precedent case law, the AAO does not utilize the analysis of corporate bank accounts and the use of depreciation expenses in its review of I-140 employment-based petitions. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). These decisions will be discussed more completely further in the proceedings. Thus, the AAO decisions referenced by counsel in the initial submission of the petition and on appeal are erroneous. With regard to counsel's reference to *Davila-Bardales v. INS*, and the findings in that precedent decision, CIS is not adopting conflicting policies in the instant petition, but rather correctly analyzing the petitioner's financial information submitted to the record and following relevant precedent decisions and regulatory guidance.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. 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 will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The beneficiary did not claim to have worked for the petitioner. Nor did the petitioner submit any evidentiary documentation that it had paid any wages to the beneficiary. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

Counsel suggests that the petitioner's net income can be added to its net current assets to show the total amount of funds available to pay the wage. It is clear that counsel wants to combine the petitioner's taxable income with the cash also received by the business for that year as part of the Schedule "L" current assets. CIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. Counsel's method would duplicate revenues received by the business during the year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, and contrary to counsel's assertions and previous unpublished AAO decision findings, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax returns for 2001, 2002, 2003, and 2004 show the following amounts of ordinary income: 24,511, \$7,262, -\$2,559, and \$7,850. These figures fail to establish the ability of the petitioner to pay the proffered wage of \$37,294.40.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.⁶

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner submitted the following information for tax years 2001, 2002, and 2003:

	2001	2002	2003	2004
Ordinary Income	\$ 24,511	\$ 7,262	\$ -2,559	\$ 7,850

⁶ It is noted that in the director's decision, the director appeared to allow the petitioner to combine the petitioner's net income and net current assets in the petitioner's examination of its ability to pay the proffered wage. But as stated above, the examination of the petitioner's net income is an alternative to an examination of the petitioner's net current assets.

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Current Assets	\$ 1,310	\$ 2,095	\$ 6,038	\$ 1,014
Current Liabilities	\$ 1,319	\$ 2,360	\$ 1,937	\$ 1,978
Net current assets	\$ -9	\$ -265	\$ 4,101	\$ -964

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary in any of the years examined. Thus, the petitioner has to establish its ability to pay the entire proffered wage of \$37,294.40. In 2001 the petitioner shows a net income of \$24,511, and negative net current assets of nine dollars, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2002, the petitioner shows a net income of \$7,262 and negative net current assets of \$265, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2003, the petitioner shows a net income of -\$2,559 and net current assets of \$4,101, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2004, the petitioner shows a net income of \$7,850 and negative net current assets of \$964, and has not, therefore, demonstrated the ability to pay the proffered wage. Thus, the petitioner has not established its ability to pay the proffered wage based on either its net income or net current assets.

As noted previously, the petitioner's depreciation expenses, or its monthly balances in its corporate bank account are not viewed as additional sources of funds with which to pay the proffered wage. Thus the petitioner has not established that any other funds were available to pay the proffered wage.

On appeal, counsel asks that the totality of the petitioner's circumstances be considered when examining the petition. Counsel asserts that the employment of the beneficiary will generate additional profits for the petitioner. Counsel and the petitioner both assert that the petitioner has lost about \$100,000 in business due to the lack of a glass engraver such as the beneficiary. However, neither counsel nor the petitioner provided any evidentiary documentation as to lost business opportunities, or contracts, and to the actual business ever conducted by the petitioner in the area of copper wheel engraving. Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Counsel also refers to *Matter of Sonogawa*, and to an unpublished AAO decision in which a petitioner with a negative net profit, based on the totality of its circumstances was found to have established its ability to pay the proffered wage. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion

design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. In fact, 2001 was the most profitable year for the petitioner, in terms of ordinary income, in the tax returns reviewed in the present proceedings. Furthermore, the petitioner presented no further documentation as to its business reputation or reputation in the field of copper-wheel engraving. While the skills of the beneficiary in copper-wheel engraving may be unique in what the petitioner describes as a dying art, this factor would not be sufficient to establish that the totality of the petitioner's circumstances warrant approval of the I-140 employment-based petition.

With regard to the unpublished AAO decision that considered the petitioner's totality of circumstances, as previously stated, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, as described previously in footnote number five, the totality of the petitioner's circumstances in the previous AAO decision are not analogous to the petitioner's circumstances in the instant petition. The other petitioner established that it had 22 million dollars in gross receipts during the priority year, over 1,300 employees, and paid salaries and wages of over 13 million dollars. In contrast, although the instant I-140 petition indicates the petitioner has been in business since 1980, the petitioner's tax returns indicate the petitioner only incorporated in 1997. The tax return also indicates that wages paid by the petitioner have ranged from \$21,000 to \$0 (zero) in the years in question, and gross receipts or sales have ranged from \$434,883 in the priority date year of 2001 to \$545,188 in 2003. The petitioner also has asserted that it employs its president and his wife as the sole employees. Thus, even if the unpublished AAO decision were to be considered in these proceedings, the findings of the decision would not provide significant support for the instant petition based on the petitioner's overall circumstances.

The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.