

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

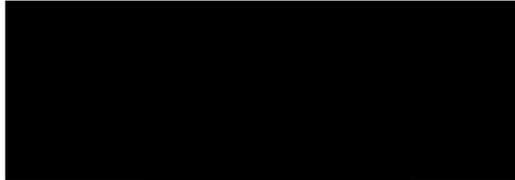
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: [REDACTED]
LIN 07 041 52856

Office: NEBRASKA SERVICE CENTER

Date: OCT 01 2007

IN RE: Petitioner:
Beneficiary:



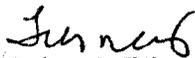
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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.

for 
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center denied the employment-based immigrant visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a psychological consulting service. It seeks to employ the beneficiary permanently in the United States as a convention manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 28, 2007 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the

employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 9, 2003. The proffered wage as stated on the Form ETA 750 is \$25,938 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's brief, a letter, dated April 2, 2007, from Morey, Jones, & Pfeiffer, P.C., Certified Public Accountants (CPAs), copies of the petitioner's 2003 through 2005 Forms 1120X, Amended U.S. Corporation Income Tax Returns, a copy of the petitioner's 2006 Form 1120, U.S. Corporation Income Tax Return, a copy of the beneficiary's 2005 Form 1040X, Amended U.S. Individual Income Tax Return, a copy of the beneficiary's 2006 Form 1040, U.S. Individual Income Tax Return, copies of the 2005 and 2006 Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, and copies of the petitioner's 2003 through 2006 compiled financial statements.² Other relevant evidence includes a copy of the petitioner's compiled financial statement³ for the years ending September 30, 2005 and September 30, 2006, copies of the petitioner's original 2003 through 2005 Forms 1120, and copies of the beneficiary's 2003 through 2006 Forms W-2, Wage and Tax Statements. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's original 2003 through 2005 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of -\$8,077, -\$8,393, and \$2,703, respectively. The petitioner's original 2003 through 2005 Forms 1120 also reflect net current assets of -\$21,569, -\$40,753, and -\$24,713, respectively.

The 2003 through 2006 Forms W-2, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary by the petitioner of \$20,110.80 in 2003, \$20,704.66 in 2004, \$21,970.85 in 2005, and \$23,141.19 in 2006.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the AAO will not consider the compiled financial statements when determining the petitioner's continuing ability to pay the proffered wage of \$25,938 from the priority date of April 9, 2003.

³ See footnote 2.

The 2005 and 2006 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary by the petitioner of \$3,900 in 2005 and \$3,650 in 2006.

The beneficiary's 2005 Form 1040X reflects a change in adjusted gross income from \$22,518 to \$26,142, and the beneficiary's 2006 Form 1040 reflects an adjusted gross income of \$26,533.

The petitioner's 2003 through 2005 Forms 1120X reflect changes in net current assets from -\$21,569 to \$229,898 in 2003, from -\$40,753 to \$222,202 in 2004, and from -\$24,713 to \$249,910 in 2005.

The petitioner's 2006 Form 1120 reflects a taxable income before net operating loss deduction or special deductions or net income of \$5,438 and net current assets of \$334,804.

The letter, dated April 2, 2007, from the petitioner's CPA states:

Recap of financial standing of the Family Institute of Virginia calculated on the accrual basis in accordance with "Statements on Standards for Accounting and Review Services" issued by the American Institute of Certified Public Accountants:

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>4 Yr. Average</u>
Net Income	28,160	2,434	11,919	82,118	31,158
<u>Net Current Assets:</u>					
Current Assets	318,929	363,034	373,655	465,155	
Current Liabilities	<u>(80,017)</u>	<u>(124,242)</u>	<u>(121,155)</u>	<u>(129,260)</u>	
Net Current Assets	238,912	238,792	252,500	335,895	
Stockholder's Equity	242,282	244,716	256,635	338,753	

This corporation has been in existence since 1978, and has consistently been able to meet its financial obligations throughout these 29 years. Please note that the accrual basis income as stated above is net of the annual salary expenses of Maria P. Rivera. As reflected above, the past four years' income, net current assets and stockholder's equity reflect this company's strong financial position.

Corporate Tax Returns:

The 2003, 2004, and 2005 Federal Corporate Tax Returns were amended to reflect the accrual basis of accounting as indicated on the Balance Sheet section of page 4, form 1120 for each year. The current year 2006 federal tax return was also prepared in a consistent manner.

Income for federal and state income tax purposes is reported on the "Cash Basis" which is a standard method utilized for personal service businesses.

The amended 2003, 2004, and 2005, as well as the 2006 federal tax returns were signed by a corporate officer in my presence and mailed to the Internal Revenue Service by my office.

On appeal, counsel alleges that the 2003 through 2006 accrual basis financial statements, the 2003 through 2005 amended tax returns, the 2006 tax return, the beneficiary's 2005 and 2006 Forms 1099-MISC., along with her 2005 amended and her 2006 personal tax returns, and the letter from the petitioner's CPA clearly show the ability of the petitioner to pay the proffered wage for the years referred to in the decision.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner submitted copies of the beneficiary's 2003 through 2006 Forms W-2 showing that the beneficiary earned wages of \$20,110.80, \$20,704.66, \$21,970.85, and \$23,141.19, respectively, in those years. The petitioner also submitted copies of the beneficiary's 2005 and 2006 Forms 1099-MISC showing that the beneficiary earned additional wages of \$3,900 in 2005 and \$3,650 in 2006. Therefore, the petitioner has established that it employed the beneficiary in the years 2003 through 2006.

The petitioner is obligated to establish that it has sufficient funds to pay the difference between the proffered wage of \$25,938 and the actual wages paid to the beneficiary. In this case, those differences for the years 2003 through 2006 would be \$5,827.20, \$5,233.34, \$67.15, and -\$853.19 (the beneficiary was paid more than the proffered wage), respectively.⁴

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054. *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

⁴ For the years 2005 and 2006, the total wages from the beneficiary's Forms W-2 and Forms 1099-MISC were added together to obtain the amount of pay the beneficiary earned during those two years. It is noted that there is no explanation as to why the petitioner would use both the Form W-2 and the Form 1099-MISC to show the beneficiary's wages.

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.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A. The petitioner's tax returns demonstrate that its net incomes in 2003 through 2005 (original returns and amended returns) were -\$8,077, -\$8,393, and \$2,703, respectively. The petitioner's 2006 tax return demonstrates that its net income in 2006 was \$5,438. The petitioner could not have paid the difference of \$5,827.20 between the proffered wage of \$25,938 and the actual wages paid to the beneficiary of \$20,110.80 from its net income of -\$8,077 in 2003. The petitioner could not have paid the difference of \$5,233.34 between the proffered wage of \$25,938 and the actual wages paid to the beneficiary of \$20,704.66 from its net income of -\$8,393 in 2004. The petitioner could have paid the difference of \$67.15 between the proffered wage of \$25,938 and the actual wages paid to the beneficiary of \$25,870.85 from its net income of \$2,703 in 2005. In 2006, the petitioner paid the beneficiary \$853.19 more than the proffered wage of \$25,938 (\$23,141.19 Form W-2 + \$3,650 (Form 1099-MISC. = \$26,791.19). Therefore, the petitioner has established its ability to pay the proffered wage in 2005 and 2006 from its net income, but not in 2003 and 2004.

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.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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's 2003 through 2005 original tax returns reflect net current assets of -\$21,569, -\$40,753, and -\$24,713, respectively. The petitioner's 2003 through 2005 amended tax returns reflect net current assets of \$229,898, \$222,202, and \$249,910 respectively. The petitioner's 2006 tax return (accrual basis) reflects net current assets of \$334,804. The petitioner could not have paid the differences of \$5,827.20 in 2003, \$5,233.34 in 2004, and \$67.15 in 2005 between the proffered wage of

⁵ 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.

\$25,938 and the actual wages paid to the beneficiary of \$20,110.80 in 2003, \$20,704.66 in 2004, and \$25,870.85 in 2005 from its net current assets of -\$21,569 in 2003, -\$40,753 in 2004, and -\$24,713 in 2005 using the petitioner's original tax returns (cash basis). The petitioner could have paid the differences of \$5,827.20 in 2003, \$5,233.34 in 2004, and \$67.15 in 2005 between the proffered wage of \$25,938 and the actual wages paid to the beneficiary of \$20,110.80 in 2003, \$20,704.66 in 2004, and \$25,870.85 in 2005 from its net current assets of \$229,898 in 2003, \$222,202 in 2004, and \$249,910 in 2005 when using the petitioner's amended tax returns (accrual basis). In 2006, the beneficiary was paid \$853.19 more than the proffered wage of \$25,938, and, therefore, the petitioner has established its ability to pay the proffered wage in 2006.

On appeal, counsel contends that the 2003 through 2006 accrual basis financial statements, the 2003 through 2005 amended tax returns, the 2006 tax return, the beneficiary's 2005 and 2006 Forms 1099-MISC., along with her amended 2005 amended and her 2006 personal tax returns, and the letter from the petitioner's CPA clearly show the ability of the petitioner to pay the proffered wage for the years referred to in the decision.

Despite counsel's explanation of the rationale for amending the petitioner's corporate tax returns, because the petitioner amended its returns in the middle of the proceedings, CIS would require IRS-certified copies to corroborate the assertion that the amended returns were actually processed by the IRS. The amended returns submitted by the petitioner are not certified copies. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, CIS will only examine the version of the petitioner's tax returns that were initially submitted and not the amended version as submitted on appeal.

In addition, the petitioner's original tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

Furthermore, although the petitioner's CPA stated that he had amended the petitioner's 2003 through 2005 income tax returns and prepared the petitioner's 2006 income tax return based on the accrual accounting method, which were then mailed to the IRS from his office, there is no clear evidence in the record of proceeding that the IRS gave approval to the petitioner to change accounting methods. The guidelines at *Accounting Periods and Methods*, I.R.S. Pub. No. 538 (03/2004) state:

Each taxpayer (business or individual) must figure taxable income on an annual accounting period called a tax year. The calendar year is the most common tax year. Other tax years are a fiscal year and a short tax year.

Each taxpayer must also use a consistent accounting method, which is a set of rules for determining when to report income and expenses. The most commonly used accounting methods are the cash method and an accrual method. Under the cash method, you generally report income in the tax year you receive it and deduct expenses in the tax year you pay them. Under an accrual method, you generally report income in the tax year you earn it, regardless of when payment is received, and deduct expenses in the tax year you incur them, regardless of when payment is made.

* * *

You can generally choose any permitted accounting method when you file your first tax return. You do not need IRS approval to choose the initial method. You must, however, use the method consistently from year to year and it must clearly reflect your income.

Once you have set up your accounting method and filed your first return, you generally must get IRS approval before you change the method. In general, you must file a current Form 3115 to request a change in either an overall accounting method or the accounting treatment of any item.

In the instant case, there is no evidence in the record of proceeding that corroborates that the petitioner filed a current Form 3115 to request a change in its accounting method, and there is no evidence that the petitioner received approval from the IRS to change its accounting method.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the

petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner submitted its 2003 through 2005 tax returns with only the 2005 return establishing its ability to pay the proffered wage (the petitioner established its ability to pay the proffered wage in 2006 by actually paying the beneficiary more than the proffered wage of \$25,938 by \$853.19). In addition, none of the returns are enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. Furthermore, there is no evidence of the petitioner's reputation throughout the industry.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.