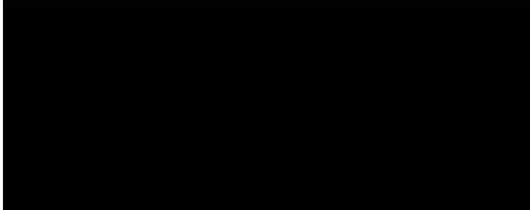




U.S. Citizenship
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Services

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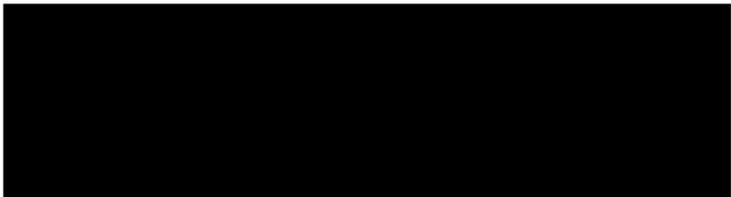
B/b

FILE: LIN-06-167-51902 Office: NEBRASKA SERVICE CENTER Date: **FEB 27 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

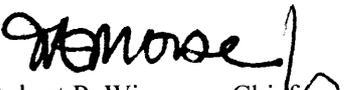
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 preference visa petition was denied by Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a wood manufacturer. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker and bench carpenter (cabinet maker). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 1, 2007 denial, the single issue in this case is whether or not the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence with its own tax returns or other regulatory-prescribed evidence.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$21.00 per hour (\$43,680 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on April 28, 2001, the beneficiary claimed to have worked for the petitioner since November 1998. On the petition, the petitioner

claimed to have been established in 1992, and to currently employ three workers. However, the petitioner did not provide information about its gross annual income and net annual income on the petition.

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 appeal.¹ On appeal counsel submits a brief, the petitioner's Form 1096 and Form 1099 to its employees for 2001, 2002, 2004 through 2006, unaudited financial statements of [REDACTED] for 2001 through 2006 and copies of two letters from the petitioner's accountant as additional evidence to establish the petitioner's ability to pay the proffered wage. Other relevant evidence in the record includes the petitioner's corporate tax returns for 2001 through 2005, the petitioner's bank account statements for the years of 2001 and 2003 through 2006 (from December 30, 2000 to December 31, 2001, from February 1, 2003 to December 31, 2003, from January 1, 2004 to December 31, 2004, from January 1, 2005 to December 31, 2005 and from December 31, 2005 to October 31, 2006), copies of the beneficiary's six cancelled paychecks from the petitioner in 2006, [REDACTED] corporate tax returns for 2002 through 2005 and its bank statements for the period from October 1, 2005 to August 31, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that because both the petitioner and [REDACTED] are solely owned by [REDACTED] the net income and/or assets of [REDACTED] and [REDACTED] personally should be considered in determining the petitioner's ability to pay the proffered wage, and that the information provided for the petitioner, [REDACTED] and [REDACTED] established the petitioner's ability to pay the proffered wage.

The petitioner of the instant petition and the employer listed on the relevant labor certification application is [REDACTED] with a federal employer identification number: [REDACTED]. The New York State Department official business database website shows that there are three corporations possibly called as [REDACTED] and [REDACTED]. *See* http://appsex18.dos.state.ny.us/corp_public/corpsearch.entity_search.entry (accessed on February 7, 2008). The petitioner submitted [REDACTED]'s federal tax returns and 1099 forms as evidence of the petitioner's continuing ability to pay the proffered wage as of the priority date. It is noted that the federal tax returns filed and 1099 forms issued by [REDACTED] show that [REDACTED] and the petitioner are located at the same address, and more importantly, they share the same federal employer identification number [REDACTED]. Therefore, the AAO finds that the submitted evidence is sufficient to show that [REDACTED] and the petitioner (Roaster Tech) are the same entity, and thus [REDACTED]'s tax returns and other regulatory-prescribed evidence will be considered as evidence of the petitioner's continuing ability to pay the proffered wage in the instant case.

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).

Counsel claimed that [REDACTED] has in the past and will herein assist the petitioner to pay the proffered wage to the beneficiary. The petitioner's accountant submitted letters to verify that [REDACTED] is the president and owns 100% capital stock of the petitioner and [REDACTED]. However, the petitioner's tax returns in the record indicate that the petitioner was structured as a C corporation on June 7, 1989 and assigned a federal employer identification number (FEIN) [REDACTED] while the certificate of incorporation and tax returns of [REDACTED] show that it was structured as a C corporation and assigned the FEIN [REDACTED]. The search in the New York State Department official business database website reveals that each of the two corporations were established as New York domestic business corporations and are currently active.² Although [REDACTED] solely owns 100% of stock of both corporations, the petitioner and [REDACTED] are separate corporations. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Contrary to counsel's assertion, Citizenship and Immigration Services (CIS) may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Therefore, in the instant case, neither the assets of [REDACTED], nor the assets of [REDACTED] himself can be utilized to establish the petitioner's ability to pay the proffered wage.

In addition, the petitioner may only use another business entity's net income or net current assets to establish its ability to pay the proffered wage if that other corporation is qualified to be a successor-in-interest to the petitioner or that the petitioner and the other corporation are the same business entity. However, the record does not contain any evidence to establish a successor-in-interest relationship or same business status between [REDACTED] and the petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). A petitioner doing business at the same location as the other corporation does not establish that the other corporation is a successor-in-interest to the petitioner. Similarly, an individual solely owning both the petitioner and the other corporation does not establish that they are the same business entity. Therefore, the AAO cannot concur with counsel's assertion that the financial information and documentation of [REDACTED] and [REDACTED] should be considered in determining the petitioner's continuing ability to pay the proffered wage. The AAO will determine whether the petitioner established its ability to pay the proffered wage in the instant case solely upon reviewing and examining the petitioner's own financial documentation.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic.

² See http://appsext8.dos.state.ny.us/corp_public/corpsearch.entity_search.entry (accessed on February 7, 2008).

See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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. In the instant case, the beneficiary claimed to have worked for the petitioner since November 1998. The petitioner did not submit W-2 forms for its employees, but its 1096 forms and 1099 forms for the relevant years. However, only one Form 1099 is for the beneficiary, which shows that the petitioner paid the beneficiary \$7,577 as nonemployee compensation in 2006.³ Therefore, the petitioner failed to establish its ability to pay through the examination of wages actually paid to the beneficiary. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$43,680 per year from 2001, the year of the priority date, to 2005, and that it could pay the difference of \$36,103 in 2006 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

On appeal, counsel asserts that the petitioner paid substantial amounts out to subcontractors, who were used for the cabinet-making operation, and now intends on stopping and ceasing the "farming out" of the cabinet manufacturing work to those subcontractors and thus the funds once used to pay subcontractors have been "earmarked" for the salary of the beneficiary. Here counsel advised that the beneficiary would replace subcontractors. The record does not, however, name these subcontractors, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of subcontractors involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of subcontractors who performed the duties of the proffered position. If those subcontractors performed other kinds of work, then the beneficiary could not have replaced them. 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).

In addition, the petitioner reported on its tax return Schedule A Line 5, Other costs that it paid subcontractors \$108,843 in 2001 and \$58,980 in 2002 respectively. However, the petitioner's tax returns for 2003 through 2005 indicate that the petitioner did not report any other costs on line 5 of Schedule A in each year of 2003⁴ through 2005. Although the amount paid to subcontractors in 2001 and 2002 was sufficient to pay the beneficiary the proffered wage, counsel did not explain how the beneficiary could replace non-existing

³ The record also contains copies of five cancelled paychecks issued by the petitioner for the beneficiary: check No. [REDACTED] on September 29, 2006, check No. [REDACTED] on October 16, 2006, check No. [REDACTED] on October 24, 2006 and check No. [REDACTED] on November 1, 2006 in the amount of \$910, and check No. [REDACTED] on November 3, 2006 in the amount of \$1,169. The director erred in concluding that the beneficiary was being paid approximately \$21,840 per year in 2006 based on these cancelled checks; however, this error does not alter the ultimate outcome of the appeal. The AAO considers the amount of \$7,577 from the beneficiary's 1099 form for 2006 as the compensation the petitioner paid to the beneficiary in 2006.

⁴ Counsel's claim that the petitioner paid \$19,391 out to subcontractors in tax year 2003 is a factual error. The petitioner did not report any amount on line 5 of Schedule A, Form 1120 for 2003.

subcontractors in 2003 through 2005, nor did counsel explain how the petitioner could “ earmark ” the beneficiary’s proffered wage with non-existing funds paid to subcontractors for these years. Furthermore, the petitioner and the beneficiary both claimed that the beneficiary has been working for the petitioner since November 1998. The record does not contain any reasonable explanation how the beneficiary could replace those subcontractors while he himself were working as a full-time cabinet-maker. Therefore, counsel’s assertion that the beneficiary will replace subcontractors and the funds paid to subcontractors will be used to pay the beneficiary the proffered wage is not accepted and considered.

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, 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). On appeal, counsel asserts that Form 1096 shows that the petitioner paid out a total of \$55,005 in 2001 as “Miscellaneous Income” to various parties, \$94,329 in 2002, and \$1,800 in 2004 as well as \$7,661 in 2005 and \$29,457 in tax year 2006. Counsel’s reliance on the petitioner’s total income and wage expense is misplaced. Showing that the petitioner’s total income 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. Reliance on the petitioner’s depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 Chang* at 537.

The record contains copies of the petitioner’s Form 1120, U.S. Corporation Income Tax Return, for 2001 through 2005. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year is based on a calendar year. The tax returns for 2001 through 2005 demonstrate the following financial information concerning the petitioner’s ability to pay the proffered wage of \$43,680 per year from the year of the priority date:

- In 2001, the Form 1120 stated a net income⁵ of \$24,971.
- In 2002, the Form 1120 stated a net income of \$19,626.
- In 2003, the Form 1120 stated a net income of \$14,083.
- In 2004, the Form 1120 stated a net income of \$(35,385).
- In 2005, the Form 1120 stated a net income of \$17,276.

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net income to pay the 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.⁶ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were \$(13,113).
- The petitioner's net current assets during 2002 were \$(7,474).
- The petitioner's net current assets during 2003 were \$12,652.
- The petitioner's net current assets during 2004 were \$(13,990).
- The petitioner's net current assets during 2005 were \$6,000.

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel submitted bank statements for the petitioner's business checking accounts covering the months from December 2000 to October 2006. Counsel's reliance on the balances in the petitioner's bank checking

⁵ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁶ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

accounts 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

On appeal, counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and argued that much like *Sonogawa*, the petitioner is a relatively well established organization and reasonably expects continuing increase in business and profits. *Sonogawa* 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 *Sonogawa* 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 *Sonogawa*, nor has it been established that the years 2001 through 2005 were uncharacteristically unprofitable years in a framework of profitable or successful years for the petitioner.

Counsel referred to decisions issued by the AAO, but does not provide their published citations. 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).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.