U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

Public Copy

File: [redacted] Office: Texas Service Center Date: JAN 10 2001

IN RE: Petitioner: [redacted]

Application: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

IN BEHALF OF APPLICANT:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director determined that the petitioner had failed to establish the investment of $500,000, that the petitioner was actively in the process of investing $500,000, or that he met the necessary employment creation requirements. The director also determined that the petitioner had not established that the money invested came from a lawful source.

On appeal counsel argues that the petitioner has invested over $822,240.27, will meet the employment creation requirements once two Mullahs can be located, and has established the lawful source of the invested funds.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
>
> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The petitioner indicates that the petition is based on an investment in a new commercial enterprise in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000.

NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in

a new commercial enterprise . . . *which the alien has established* . . . ." (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

> (1) The creation of an original business;
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> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
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> (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The Form I-526 identifies the new commercial enterprise as [redacted] Inc. and specifies that the petitioner had invested $186,793 at the time of filing. The Marketing Plan indicates that [redacted] will produce poultry, goat and beef that is organic and slaughtered according to Islamic law. The petitioner claims that because Texas law prohibits a corporation that raises animals from also processing meat, the petitioner incorporated both Hallal Farms, Inc. and Hallal Farm Products, Inc.

The petitioner submitted the articles of incorporation for both corporations, signed October 2, 1997, but failed to submit certificates of incorporation. Therefore, it is not entirely clear when the corporations were incorporated.

Even if the petitioner established that [redacted] Inc. and [redacted] Inc. were both incorporated after 1990, he has not establish that the meat processing plant which [redacted] Inc. purchased is a new enterprise. The petitioner

submitted a letter to verify the ownership of [redacted] Co., which is on Cottle County letterhead and is signed by Chief Appraiser Rue [redacted], Judge Billy [redacted], Mayor Bill [redacted] and President of the Board of Trustees Ben Blount. This letter reveals that a meat processing plant was already in existence at the time it was purchased by [redacted] Inc. The petitioner has not demonstrated, or even claimed, that he restructured, reorganized, or expanded the meat production plant. Therefore, [redacted] Co. cannot be considered part of the new commercial enterprise. As such, any investment in [redacted] is not a qualifying investment and any employees at [redacted] cannot count toward the 10 new jobs the petitioner must create. While the director did not explicitly discuss whether [redacted] was a preexisting business, it is noted at the beginning of this decision because it is relevant to the discussion of the remaining issues which were raised by the director.

INVESTMENT OF CAPITAL

8 C.F.R. 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. ...
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The petitioner claims to be investing in [redacted] Inc. and [redacted] Products, Inc., which will raise animals and process the meat according to Islamic law. In support of the petition, the petitioner submitted documentation regarding the purchase of 153 acres in Childress, Texas, for $40,499.27; documentation of the purchase of [redacted] in Childress, Texas, for $50,000; and documentation of the purchase of five pieces of property from [redacted] for $101,646.00, $5,497.18, $3,322.68, $9,814.59, and $1,000. In response to a request for additional information, the petitioner submitted documentation indicating that on February 23, 1998, [redacted] Inc. purchased [redacted] Co. from the [redacted] Independent School District for $10,000.

Regarding the purchase of the 153 acres in Childress from [redacted] the petitioner submitted the Settlement Statement, Deed of Trust to Secure Assumption, and Assumption of Warranty Deed. These documents reveal that the petitioner purchased the property for $40,499.27. However, the petitioner assumed the existing mortgage of $25,145.27, paying only $15,354 in cash. The Deed of Trust indicates Mr. [redacted] retained a Vendor's Lien, indicating

the loan was secured by the property purchased, and not the petitioner's personal assets.

Regarding the purchase of [redacted], the petitioner submitted the Deed of Trust, Vendor's Lien Note, and Warranty Deed with Vendor's Lien. These documents reveal that the petitioner purchased this hotel for $50,000 on October 16, 1997, with no cash down and no payments due until April 15, 1998. The Deed of Trust indicates that the petitioner will apply "rent and other income and receipts to payment of the note." The Warranty Deed with Vendor's Lien indicates that:

> the vendor's lien against and superior title to the property are retained valid until each note described is fully paid according to its terms, at which time this deed shall become absolute.

Therefore, this loan was also secured by the property, and not the petitioner's assets.

The record contains warranty deeds and sales contracts for the purchase of five pieces of property from [redacted]. The sales contract for two tracts of property for $101,646 is unsigned. In addition, it calls for an initial payment of $13,000 cash, with the remaining $88,646 to be paid by assuming [redacted] mortgage payments of $700 per month. The "Assignment of Buyer's Interest in Contract for Deed" documents the sale of [redacted] on December 22, 1997. As this property is the petitioner's personal residence, the apparent $5,497.18 purchase price cannot be considered to be invested in the business.

The property purchased for $3,322.68 is documented by a "Contract and Agreement" which calls for a down payment of $3,000, the remaining $322.68 payable in installments of $80.69. The purchase of property for $9,814.59 is documented by a Contract and Agreement which calls for a Vendor's Lien Note for the full sum with monthly payments of $170.54. The agreement further states that in the event of default by the petitioner, the contract is void and the petitioner must vacate the premises. As such, the loan is secured by the property and not the personal assets of the petitioner. Finally, the Warranty Deed documents the purchase of a final piece of property from Mr. [redacted] for $1,000 cash.

The remaining "Warranty Deed with Vendor's Lien" and "Deed of Trust" reveal that [redacted]. purchased a piece of property from the Paducah Independent School District for $10,000. Additional documentation reveals that this property contains a meat processing plant now known as [redacted]Co. The agreements call for a down payment of $2,500 with the remaining $7,500 to be financed. As the seller retains title until the full payment of the loan, the loan is secured by the property, and not the

petitioner's personal assets. Regardless, as discussed above, since [redacted] Inc. appears to have purchased an existing meat processing plant, [redacted]. cannot be considered part of the new commercial enterprise.

The petitioner also submitted a list of all the necessary equipment and costs, totaling between $1,050,000 and $1,850,000, depending on the type of shed selected. The petitioner also indicated the sales and production costs would amount to $821,716.89; however the petitioner did not indicate if these costs are daily, weekly, monthly, quarterly, or yearly. A separate page indicates monthly costs of only $65,369.69, with monthly sales amounting to $450,000.

In response to the request for additional information, the petitioner submitted a letter from [redacted] Manager of A&A Builders Developers in Bombay, India regarding a "transfer of assets." The letter indicates the cost for transferring six poultry houses would be $528,000. and would commence upon the petitioner providing "confirmation of a receipt of an import permit and the duty applied to such a transfer." However, while the letter indicates the transfer of all six houses should have been completed by July 1999, the petitioner has not submitted any evidence that the houses were actually shipped. Nor has the petitioner provided a receipt or cancelled check demonstrating that he personally paid the $528,000.

The petitioner also submitted a building quotation for a full eave vent grower building system. The total price is quoted as $122,552.39. However, there is no indication [redacted] Inc. or the petitioner ever purchased this system.

Finally, the petitioner submitted an invoice for 125 teakwood stems and 1200 teakwood seed totaling $35,250. As the new commercial enterprise is supposedly producing organic meat slaughtered to meet Islamic standards, it is not clear how teakwood plants would be an asset to the business. While the record contains some discussion of the value of teakwood chicken houses over houses made from other wood, the record also indicates the chicken houses were being transferred to the farm from Bombay. Therefore, the teakwood stems and seeds do not appear to be purchased for use by [redacted], Inc.

On appeal, the petitioner submits numerous invoices for the purchase of meat dated from April 2000 through August 2000, and a copy of the front of a check issued to [redacted] Processors for $4,500. As the petitioner did not provide a copy of the back of the check, he has not established that this check was ever cashed. In addition, the petitioner's name and address is not pre-printed on the check, but handwritten, although it is acknowledged that the pre-printed account number at the bottom of the check does match

the account number on the bank statements provided in support of the petition.

On appeal, counsel asserts that the petitioner has invested at least $822,240. Counsel includes $528,000 for the transfer of the chicken houses, $40,490.27 for the 153 acres, $35,250 for the teakwood seeds and stems, $175,000 for the value of the motel purchased for $50,000, and two houses supposedly purchased to house workers[1] for $21,500 and $22,000.

However, as stated above, the petitioner has not demonstrated who paid for the transfer of the chicken houses, if indeed they were transferred. The houses were supposed to have been transferred by July 1999, and yet, while the petitioner has continued to submit new documentation up until September 2000, the petitioner has not provided any evidence that the chicken houses were ever transferred. Nor has the petitioner provided any evidence that he paid for the transfer out of his own personal assets, as opposed to payment with borrowed funds or with the assets of the business.

Indebtedness that is secured by assets of the enterprise is specifically precluded from the definition of "capital." See 8 C.F.R. 204.6(e). The petitioner's personal guarantee of payment does not change the character of a debt primarily secured by assets of the enterprise. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998.)

As stated above, the $40,490.27 was not paid in full and the loan for $25,145.27 was secured by the property, and not by the petitioner's assets. Nor has the petitioner provided a cancelled check and bank statements showing the debit of the remaining $15,354. Therefore, the petitioner has not established that the down payment was not financed by a second mortgage secured by the property.

Regarding the teakwood seeds and stems, as the chicken houses were allegedly to be transferred from Bombay, it is not clear that the teakwood stems and seeds were purchased for Hallal Farms, Inc., which is supposedly a meat production business. Therefore, the petitioner has not established that the $35,000 value of the seeds and stems was invested into the corporation.

The current value of [redacted] is not relevant to the amount of the petitioner's investment. It is only relevant that the petitioner purchased the motel for $50,000. However, even the

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[1] While counsel asserts the houses will be used for "workers," the petitioner asserted in his own letter submitted in response to the request for additional information that the houses would be used to house the directors and himself.

$50,000 price was not contributed by the petitioner. Rather, as noted by the director, the money was to be paid from the income of running the motel. While the petitioner claims that the motel was purchased to be renovated into residences for the workers at Hallal Farms, the purchase agreement for [redacted] Motel gives the sellers an interest in the receipts of the motel until the final installment of the purchase price is paid. Therefore, the petitioner was obligated to continue operating the business as a motel. As such, the petitioner's claim that the motel will be used to house workers is questionable.

The petitioner has not provided any evidence of purchasing houses for $21,500 and $22,000; however, one of the pieces of property he did purchase is his own house. The definition of "commercial enterprise" specifically precludes "non-commercial activity such as owning and operating a personal residence." See 8 C.F.R. 204.6(e). The petitioner cannot include the purchase of his own personal residence as part of his investment in [redacted], Inc. The other properties purchased by the petitioner from Mr. [redacted] have not been documented to be connected to [redacted] Inc. Even if these properties are the properties that the petitioner asserts will be used to house the directors of the corporation, that use has not been documented. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, 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, any money used towards the purchase of private houses for the directors of the corporation was not made available to the profit-making, employment-creating part of the enterprise. The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based. Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998.)

The invoices and check submitted on appeal are all dated in 2000. [redacted], Inc. was incorporated in 1997, the farm was purchased on October 16, 1997, and the meat processing plant was purchased on February 23, 1998. Therefore, these invoices do not reflect start-up costs. As such, the purchase amounts reflected by these invoices may have been paid from the proceeds of earlier transactions, and not from the petitioner's personal funds. Moreover, the invoices are all for meat to be delivered to the [redacted] Co. Not only do these invoices not demonstrate an investment in a *new* commercial enterprise, they raise doubt regarding the petitioner's alleged plan to have his own farm supply the meat to [redacted] Co. as the meat processing plant is receiving meat from other sources.

The other documentation in the record does not indicate that the petitioner invested $500,000 into [redacted], Inc. The stock certificates are blank, and do not reflect that the petitioner paid capital to the corporation in exchange for stock. Moreover, the corporation is limited to issuing 1,000,000 shares at $.01 par value. As such, the total value of all shares which could be issued by the corporation is only $10,000. The cash flow projection indicates that the corporation was financed with only $448,000 in cash and $2,000,000 in loans. As the petitioner has indicated he and his wife only own 60% of the corporation, the cash flow projection does not reflect that the petitioner even contributed the full $448,000. Finally, as noted by the director, the wire transfers and petitioner's bank statements do not reveal an influx of significant amounts of cash or that the petitioner ever had more than a few thousand dollars in his U.S. bank account.

SOURCE OF FUNDS

8 C.F.R. 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petitioner must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
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> (iii) Evidence identifying any other source(s) of capital; or
>
> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

As evidence that the petitioner's funds originated from a lawful source, the petitioner submitted documentation regarding [redacted] Farm, documentation regarding Zays industry, his personal tax returns from India, and multiple untranslated documents. The

petitioner has requested additional time to have the remaining documents translated, but, as of this date, has submitted no additional translations.

The petitioner submitted a certificate registering [redacted] as a small-scale industrial unit as of February 7, 1993 and a letter from an accountant confirming that the petitioner provided more than 10% of the total project capital. The accountant does not, however, indicate either the amount of the total project capital or the value of the petitioner's share of the business at present. Counsel asserts this business is worth 6,000,000 rupees or $142,857.00. As stated above, the assertions of counsel do not constitute evidence. Matter of Obaigbena, supra. The record does not support counsel's claim.

The petitioner also submits a provisional registration certificate for [redacted] Industries of which the petitioner is listed as a proprietor, partner, director, or member of the managing committee trustee. While the document lists some start up costs, it does not list the total value of the company or the petitioner's share.

Finally, the petitioner submits tax returns for 1994 through 1999. These documents indicate that the petitioner received an annual income ranging from 41,000 to 65,000 rupees, or between $9,762 and $15,476. This level of income does not explain how the petitioner obtained $500,000 for investment.

Regardless, even if the petitioner had established a lawful source of income from his business which could explain the claimed $500,000 of investment cash, the petitioner has not demonstrated the source of the money used to start up his Indian businesses.

THE PLAN DOES NOT MEET THE EMPLOYMENT-CREATION REQUIREMENT

8 C.F.R. 204.6(j)(4)(iii) states:

> To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports resulting from the Pilot Program. Such evidence may be demonstrated by reasonable methodologies including those set forth in paragraph (m)(3) of this section.

8 C.F.R. 204.6(m)(7) states, in pertinent part:

> An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within a regional center approved pursuant to paragraph (m)(4) of this section and that such investment will create jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise.

Regarding indirect job creation, 8 C.F.R. 204.6(m)(7)(ii) further states:

> To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

Finally, 8 C.F.R. 204.6(g)(2) relates to multiple investors and states, in pertinent part:

> The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

As evidence of employment creation, the petitioner submits on appeal eight IRS Forms W-4. The petitioner asserts that the business is looking for two additional employees, Muslim Mullahs, but has been unable to find qualifying individuals in Childress or willing to locate to Childress. The petitioner submits letters documenting the search for qualifying Muslim Mullahs.

The W-4s alone, without supporting payroll information, cannot establish that the eight employees are working full time. Nor has the petitioner established whether these employees are working on the farm or in the meat processing plant. As stated above, the meat processing plant has not been established to be a new commercial enterprise. As the petitioner did not establish the number of pre-existing employees, any employment at that plant has not been established to be a net gain of employment. A petitioner

cannot directly cause a net loss of employment. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998). In addition, the petitioner has not submitted the completed INS Forms I-9 for these individuals. Therefore, the petitioner has not established that these employees have authorization to work in the United States and are qualifying employees.

Regarding the remaining two positions, the investor program was designed to create jobs for United States citizens and lawful permanent residents. The lower investment amount for Targeted Areas is intended to attract investors to these struggling areas to reduce high levels of unemployment. For the petitioner to count as two of his qualifying jobs, jobs that cannot be filled by residents of the Targeted Area and possibly not even by someone in the United States is not in keeping with the spirit of the law. The lack of response to the petitioner's advertisement strongly suggests the petitioner will not be able to fill the position with a lawful permanent resident or United States citizen. If the petitioner to locate a permanent resident or citizen, he would not be able to fill the position with a qualifying employee.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

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. Accordingly, the appeal will be dismissed and the petition will be denied.

ORDER: The appeal is dismissed.