

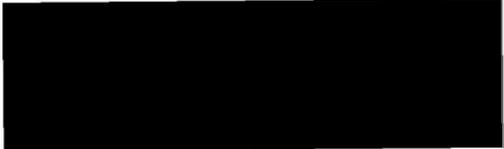


U.S. Citizenship
and Immigration
Services

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File: SRC 05 062 51146 Office: TEXAS SERVICE CENTER Date: **SEP 05 2006**

IN RE: Petitioner:
Beneficiary:



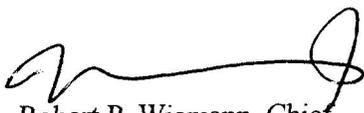
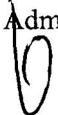
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, an Oklahoma sole proprietorship established by the beneficiary, operates a shopping mall kiosk selling cellular phones. The petitioner claims that it is the affiliate of [REDACTED] located in Thane, India. The petitioner seeks to employ the beneficiary its executive manager for a two-year period, and indicated that it was filing as a new office.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive position. The director noted that there was no evidence of a “support structure” to relieve the beneficiary from performing the services of the business, nor evidence of an office or other physical premises other than the shopping mall kiosk. The director also noted that as the beneficiary purchased a business that was already operating in the United States, the petition would not qualify to be treated as a “new office” as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). The director observed that the U.S. entity is a sole proprietorship owned by the beneficiary, and not a corporation, as initially claimed by the petitioner. However, the director did not specifically enter a determination as to whether the U.S. entity is a qualifying organization.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director incorrectly assumed that the beneficiary would operate the business without first requesting evidence related to the company’s staffing. Counsel asserts that other employees will run the day-to-day operations and the beneficiary will not be performing tasks such as operating a cash register. Counsel contends that the beneficiary meets each of the criteria for managerial and executive capacity. Counsel submits a brief in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary’s application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue in the present matter is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;

- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on December 30, 2004. The petitioner stated on Form I-129 that it has one employee and intends to employ the beneficiary as its executive manager. In an attached statement, the beneficiary described his proposed duties as follows:

In his executive capacity as CEO and President, [the beneficiary] will direct the management of [REDACTED] in its entirety by overseeing the operations of the business. In addition, all the goals and policies of the organization will be established solely by [the beneficiary]. Furthermore, [the beneficiary] will be exercising wide latitude in discretionary decision-making of [REDACTED]. Finally, owning 100% of the shares, [the beneficiary] will receive no supervision from any other shareholders and will receive only general supervision from the board of directors of the organization.

The director issued a request for additional evidence on January 12, 2005, but did not specifically request additional information regarding the beneficiary's employment capacity. The director instructed the petitioner to submit the U.S. company's articles of incorporation, bylaws and stock certificates, a lease for the business premises, and evidence that the foreign company had funded the U.S. entity.

In a response dated March 30, 2005, counsel for the petitioner indicated that the U.S. entity is a sole proprietorship owned by the beneficiary and registered in the State of Oklahoma. In response to the director's request for evidence of funding by the foreign entity, counsel referenced the regulatory evidentiary requirements for a "new office" petition, and noted that the petitioner in this case, "[REDACTED]" has been in existence previously, had been under the control of a different owner prior to the beneficiary's purchase of the business, and "was already open and operating when it was purchased by [the beneficiary] for \$5,000." In an attempt to comply with the director's request, the petitioner submitted evidence that the beneficiary obtained \$8,500 from a foreign exchange agency in India in July 2004, prior to his admission to the United States as a visitor that same month.

The director denied the petition on April 15, 2005, concluding that the petitioner had failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity. Specifically, the director stated:

Dial N Style itself is an existing business comprised of a kiosk in a mall for the sale of telephones. The beneficiary bought the business from the previous owners for \$5,000. This petition cannot be considered a new office because the petitioner bought an existing business. There is no evidence that this business would support a purely executive or managerial position as contemplated in the regulations. The petitioner, who entered the country with

minimal funds, has bought the right to one kiosk and would necessarily need to help run the kiosk himself simply to earn a living. There is no evidence of any kind of support structure within the business that would isolate him from the day-to-day running of the kiosk. The evidence submitted with the request for additional information shows that no business office, beyond the kiosk itself, has been acquired.

On appeal, counsel for the petitioner objects to the director's conclusion that there is no "support structure" within the business to isolate the beneficiary from the day to day running of the kiosk. Counsel states that the director did not request such evidence, and notes "the business was an existing business which was purchased from [REDACTED] who was operating it with employees running the day to day operations, just as the petitioner will be doing in this case." Counsel asserts that the beneficiary will not be "running the cash register or taking the garbage out, etc." but will be performing managerial and executive duties as required by the regulations.

Counsel cites the definition of managerial capacity and states that the beneficiary: "does manage the complete organization in its entirety"; "will supervise and control the work [of] other managerial employees as he is in charge of hiring any managers who in turn will be in charge of hiring staff and salespersons"; "has the authority to hire and fire employees;" and "does exercise discretion over the day to day operations of the business." Counsel provides a similar summary in an attempt to demonstrate that the beneficiary's role satisfies the criteria for executive capacity, noting that he "does direct the management of the organization in that he is the sole owner of the business and has the sole authority to make changes to the management"; "does establish the goals and policies of the organization"; "exercises wide latitude in discretionary decision making and has not other superior"; and "receives no supervision from any high level executive as he is the sole executive. . . and 100% owner of the business."

Counsel further suggests that the director took into account the petitioner's staffing levels without considering the reasonable needs of the organization in light of its overall purpose stage and development, as required by section 101(a)(44)(C) of the Act. Counsel emphasizes that the petitioner purchased the business and has every intention of growing and hiring more employees and managerial staff. Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Finally, counsel asserts that the petitioner "has no where stated or shown that the beneficiary would in fact be working in the day to day operations or that he would not be involved with managerial or executive duties."

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in a managerial or executive capacity in the United States.

As a preliminary matter, the AAO finds insufficient evidence in the record to establish that the beneficiary actually purchased the claimed mall kiosk business, thus raising questions as to whether there is any position at all available to the beneficiary. The petitioner has submitted evidence that the beneficiary obtained \$8,500 in U.S. currency in July 2004, was admitted to the United States as a visitor on July 26, 2004, opened a bank account under the name [REDACTED] in November 2004 with \$100, and signed an agreement to purchase the [REDACTED] cellular telephone outlet and kiosk in a Tulsa, Oklahoma shopping mall on December 1,

2004. The petitioner provided no evidence that the beneficiary actually paid \$5,000 for the business. The bill of sale submitted indicates that the beneficiary paid only ten dollars in consideration. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the petitioner did not provide the original lease/license agreement between the seller of the kiosk and the shopping mall, identifying the terms of operation and assignment of the lease or license to another individual. The agreement indicates that the seller will maintain the lease in its own name and allow the beneficiary to utilize its merchant account for the deposit of credit card receipts. Without the original agreement, the AAO cannot determine whether the business was even transferable. 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)).

Finally, the petitioner submitted a "Sales Tax Probationary Permit" issued by the Oklahoma Tax Commission on November 8, 2004 which identifies the business location of [REDACTED] as [REDACTED], which appears to be the beneficiary's residential address and is clearly not the address of the shopping mall where the kiosk is purportedly located. Collectively, the evidence presented raises questions as to whether the beneficiary actually purchased the business. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

If the petitioner did indeed purchase an existing business that was already "open and operating" as claimed by counsel in response to the request for evidence, then the petition does not qualify to be adjudicated as a "new office" petition pursuant to 8 C.F.R. § 214.2(l)(3)(v). Accordingly, the petitioner must establish that the U.S. entity will support the beneficiary in a qualifying managerial or executive capacity as of the date of filing the petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In addition, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The petitioner has failed to provide a meaningful description of the beneficiary's proposed duties that identifies the specific managerial and executive tasks to be performed as "executive manager" of the U.S.

business. The petitioner's initial description and the position description submitted by counsel on appeal consist entirely of paraphrased and verbatim statements taken from the statutory definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. Without a comprehensive description of the beneficiary's actual duties, the director reasonably looked to the petitioner's staffing levels to determine whether the totality of the evidence supported a finding that the beneficiary would perform primarily managerial or executive duties.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the petitioner claims that it will operate a retail business in a shopping mall and states that it has one employee, who is presumably the beneficiary. Given the nature of the petitioner's business, it is reasonable to assume that it would be open seven days a week during typical shopping mall hours, and thus it reasonably requires staff to be present to assist customers during the hours between 10:00 a.m. and 9:00 p.m. on most days. Based on the evidence submitted, it is reasonable to assume that the beneficiary, as the only employee, would be required to operate the kiosk, and that such non-qualifying tasks would constitute his primary duties. The petitioner has not explained how the reasonable needs of the petitioning enterprise will allow for the beneficiary's performance of primarily managerial or executive duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although counsel indicates that the beneficiary will hire managers and other employees to perform the day-to-day operations of the business, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The record does not establish that the petitioner's business, which is limited to the operation of one shopping mall kiosk, would ever require the services of a full-time bona fide manager or executive. The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however, the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational, administrative and supervisory tasks of the company. Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons who perform the management activities involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. *See* section 101(a)(44)(A)(iv) of the Act; *see also* 52 Fed. Reg. 5738, 5740 (February 26, 1987)(available at 1987 WL 127799).

Accordingly, the fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(44)(A) and (B) of the Act. The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. As discussed above, the petitioner has not established this essential element of eligibility. While the AAO recognizes that the beneficiary may exercise some discretion over the day-to-day affairs of the business, the fact that the beneficiary owns and manages a small business is insufficient to establish that the beneficiary is employed in a managerial or executive capacity. Again, the actual duties themselves reveal the true nature of the employment. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in the United States in a managerial or executive capacity. For this reason, the appeal will be dismissed.

The AAO will next consider whether the U.S. entity is a qualifying organization as required by 8 C.F.R. § 214.2(l)(3)(i). The director noted that the petitioner is a sole proprietorship operated by the beneficiary, but did not specifically enter a decision regarding this issue.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in pertinent part:

(G) *Qualifying organization* means a United States or foreign firm, corporation or other legal entity which meets exactly one of the qualifying relationships in the definitions of a parent, branch, affiliate or subsidiary specified paragraph (l)(1)(ii) of this section.

* * *

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

On Form I-129, the petitioner stated that it is an affiliate of the beneficiary's foreign employer, and noted that both businesses are 100 percent owned and controlled by the same individual, the beneficiary. In an undated letter submitted with the petition, the petitioner stated that the beneficiary owns "100% of the shares" of the U.S. company.

In the request for evidence dated January 12, 2005, the director requested a copy of the articles of incorporation for the U.S. company, a copy of the bylaws, all stock certificates, and the U.S. company's stock register.

In a response dated March 30, 2005, counsel for the petitioner stated:

Please be advised that the U.S. Company is not an incorporated company nor is it required under the regulations to be an incorporated company to be qualified as an L-1a petitioner. According to 8 CFR 214(l)(ii)(G) states in pertinent part that a "[q]ualifying organization means a United States or foreign firm, corporation, or other *legal entity* which [m]eets exactly one of the qualifying relationships (Emphasis in original)

In our case, there are no Articles of Incorporation that exist because [REDACTED] is not a corporation per se, but rather is an entity known as a DBA ("Doing Business As"), which means they are doing business under a particular name for a legitimate purpose. Case law has confirmed in the *Matter of LeBlanc* that a DBA qualifies as a company. There, the court found that petitioner, [REDACTED] qualified as a Canadian corporation. 13 I. & N. Dec. 816

....

In her April 14, 2005 decision, the director observed that although the petitioner initially claimed that the beneficiary owns 100 percent of the shares of the petitioning organization, the evidence submitted with the response to the request for evidence shows that the beneficiary "has apparently, in effect, set up as a sole proprietorship doing business as Dial N Style and therefore no copies of stock certificates exist."

Upon review of the evidence submitted, the AAO finds that the U.S. entity is not a qualifying organization for the purposes of this visa classification. While the petitioner attempts to establish an affiliate relationship between the United States and foreign entities based on common ownership by the beneficiary, as a matter of law, the beneficiary is ineligible for the classification sought. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. See 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). The petitioner

has submitted evidence that the beneficiary intends to do business in the United States as a sole proprietor. For nonimmigrant purposes, a corporation is a separate legal entity from its stockholders and able to file a petition and employ them. *Matter of Tessel*, 17 I. & N. Dec. 631 (Comm. 1981). In contrast, a sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(1) requires that the beneficiary seek to enter the United States temporarily in order to continue to render his services to a branch of the foreign employer or a parent, affiliate, or subsidiary thereof. As in the present matter, since the petitioner is actually the individual beneficiary doing business as a sole proprietor, with no authorized branch office of the foreign employer or separate legal entity in the United States, there is no U.S. entity to employ the beneficiary and therefore no qualifying organization. Approval of the instant case would effectively permit the beneficiary to self-petition.

Counsel's reliance on *Matter of LeBlanc* is not persuasive. The petitioner in *Matter of LeBlanc* was a Canadian corporation operating under a fictitious name, and seeking to open a branch office in the United States. The petitioner in this matter is not a U.S. or foreign corporation, but rather the beneficiary himself, thus the facts can be distinguished from those in the instant matter.

Based on the foregoing discussion, the petitioner is not a qualifying organization as required by 8 C.F.R. 214.2(l)(3)(i). For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.