U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: WAC-03-151-51425 Office: CALIFORNIA SERVICE CENTER Date: SEP 06 2005

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner does not exist as a United States employer; 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; and that the beneficiary was not qualified to perform the duties of the proffered position.

On appeal, counsel submits a brief and additional 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 first issue to be discussed in this case is whether or not the petitioner exists and is a United States employer. In the director's notice of intent to deny, the director noted that the petitioner provided evidence concerning Baja Fresh Mexican Grill and Costa Mesa Fresh, LLC, but the petitioner is Baja Mexican Grill, with an IRS tax number of [redacted] and location at [redacted] Costa Mesa, California. The petitioner is also Baja Mexican Grill on the alien labor certification application certified by the U.S. Department of Labor (DOL). DOL's Final Determination cover sheet, however, calls the petitioner "Baja Fresh Mexican Grill." The evidence in the record of proceeding includes partnership income tax returns for Costa Mesa Fresh, LLC, Baja Fresh – Costa Mesa (Costa Mesa), with an IRS tax number [redacted] and located in Calabasas, California for 1999, 2000, and 2001. The tax returns indicate that Costa Mesa's business was initiated on January 1, 1999. The record of proceeding also contains a copy of a Business License Tax Certificate for Baja Fresh Mexican Grill (Baja Fresh) for the address of the petitioner for 2003.

The director issued a notice of intent to deny on December 6, 2003 explaining his concern that the tax returns reflect a different name than the petitioner, and that Costa Mesa began doing business after the priority date of the instant petition, which is November 30, 1998. The director also noted that the business license tax certificate was issued in the name of an entity that is different than the name of the petitioning entity and the petitioner failed to submit a "doing business as" certificate or documentation to show a relationship between the petitioner and Costa Mesa or Baja Fresh as he requested in a prior request for evidence. Finally, the director noted that "a search of limited partnership and limited liability company records filed with California Secretary of State" indicated that Costa Mesa "has been suspended." Thus, the director doubted the existence of the petitioner prior to the priority date. The petitioner failed to respond to the notice of intent to deny (NOID) the petition so the director denied the petition accordingly.

On appeal, counsel explains that she sought an extension of time to respond to the NOID because the petitioner's prior counsel indicated he could not reply to the NOID and she was retained two days prior to the due date but there was a death in the family causing her to leave the country. She submits proof of mailing that request to the director and the original is in the record of proceeding. Counsel also explains the following, in pertinent part:

> On or about November 30, 1998, the underlying application for labor certification was submitted by Baja Fresh Mexican Grill, a restaurant located at [redacted] The documentation was being compiled at a time when the provision of law

known as 245(i) was due to expire. All of the forms were being prepared in rapid succession and several typographical errors were made on the initial documentation. Attached please find a copy of the letterhead and business cards that display the Baja Fresh logo from that time period. . . . Based upon this logo, the name of the [p]etitioner was mistakenly copied as "Baja Mexican Grill."

Here, it is important to note that Baja Fresh Mexican Grill is a popular franchised restaurant. There are presently over 255 Baja Fresh Mexican Grill restaurants located in 26 states. Although the [b]eneficiary was being petitioned by her place of employment, which was the Costa Mesa store of Baja Fresh Mexican Grill, this particular Baja Fresh Mexican Grill has continuously been operated through a holding company known as Costa Mesa Fresh.

From the Costa Mesa store's inception in 1996 through December 31, 1998 (and at the time of the filing of the labor certification application), all tax returns were filed as a sole proprietorship of the owner, [redacted] Based upon the recommendations of a CPA, [redacted] formed a Costa Mesa Fresh, Limited Liability Company (LLC), which became a successor in interest for the underlying labor certification petition. From the [sic] January 1, 1999 through December 31, 2001, all financial documentation for the [petitioner] were filed under the name Costa Mesa Fresh, LLC (Tax ID [redacted]. Then, on December 31, 2001, Costa Mesa Fresh, LLC was wound up and dissolved. The next day, on January 1, 2002, Costa Mesa Fresh, Inc. (Tax ID [redacted] took over as the new holding corporation and the new successor in interest. Such ownership changes were generally made to save money for tax purposes and to [sic] financial protection fo[redacted]

On appeal, the petitioner submits a letter from [redacted], CPA, of Feddersen & Company, LLP, Certified Public Accountants. [redacted] corroborates counsel's explanation of the corporate history of Costa Mesa d/b/a Baja Fresh Mexican Grill. Counsel also submits correspondence from DOL showing that it called the petitioner "Baja Fresh Mexican Grill."

The AAO accepts the argument that the petitioner's name is Baja Fresh Mexican Grill and that a typographical error resulted in significant confusion in these proceedings. The record of proceeding, however, does not contain sufficient evidence to support counsel and [redacted] explanations with respect to the petitioner's corporate history. For example, the record of proceeding does not contain the tax returns filed by the petitioner when it was a sole proprietorship, such as the U.S. Individual Income Tax Return on Form 1040 with accompanying Schedule C, Profit or Loss from Business statement, for 1998 and 1999. Additionally, the record of proceeding does not contain documentation supporting the argument that Costa Mesa Fresh, LLC (Tax ID 33-0833315) was the successor-in-interest to the petitioner and, if establishing that, that Costa Mesa Fresh, Inc. (Tax ID 95-48942321) was the successor-in-interest to Costa Mesa Fresh, LLC. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). 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)). 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).

The director, based on the evidence that he had before him at the time of issuing his decision, was correct in his determinations. However, on appeal, the AAO accepts that the petitioner's name is Baja Fresh Mexican Grill, but the AAO does not have sufficient objective and corroborating evidence that Costa Mesa, in its various corporate forms, succeeded the petitioner, and evidences its existence at the date of filing the alien labor certification application. The petition will be denied accordingly.

Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Thus, the AAO will next evaluate the issue of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 30, 1998. The proffered wage as stated on the Form ETA 750 is $14.38 per hour, which amounts to $29,910.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1999[1], to have a gross annual income of $1,565,733, and to currently employ 17 workers. In support of the petition, the petitioner submitted a copy of Form 1065, U.S. Return of Partnership Income, for Costa Mesa Fresh, LLC Baja Fresh – Costa Mesa, for 1999 and 2000.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 17, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director requested the petitioner's tax returns for 1998, 1999, 2000, 2001, and 2002; quarterly wage reports; any evidence that the beneficiary received wages from the petitioner; and clarification about other multiple pending petitions.

---

[1] In any additional proceedings, counsel should explain why the petitioner would represent on the petition its establishment in 1999 if the petitioner had been in business, in a different corporate form, for years prior to that.

In response, the petitioner submitted Forms 1065 partnership tax returns for Costa Mesa Fresh, LLC Baja Fresh – Costa Mesa for 1999, 2000, and 2001[2]. The tax returns reflect the following information for the following years:

	1999	2000	2001
Net income[3]	$93,794	$137,818	$200,629
Current Assets	$39,606	$39,607	$0
Current Liabilities	$72,842	$51,001	$0
Net current assets	-$33,236	-$11,394	$0

In addition, counsel submitted copies of Costa Mesa Fresh, LLC Baja Fresh – Costa Mesa's quarterly wage reports for all four quarters in 2001 and 2002 and the first two quarters in 2003. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. Prior counsel stated in his accompanying cover letter that the beneficiary was not working for the petitioner.

The director issued a NOID on December 6, 2003 expressing concerns about accepting information in unsigned tax returns and noted the omission of any tax return for 1998 and 2002, and requested IRS-certified or IRS computer printouts of the petitioner's tax returns. The director determined that the petitioner failed to respond to the NOID and issued a denial on January 29, 2004.

On appeal, counsel asserts that "IRS-certified copies or IRS computer printouts will be obtained and submitted within 30 days with a brief in support of appeal." Counsel's brief is dated February 2004. As of July 2005, more than one year later, no additional evidence or brief had been received by the AAO so we contacted counsel and requested any evidence or brief submitted on appeal. In response, counsel submitted a brief dated March 30, 2004, essentially setting forth the same arguments in the first brief, previously submitted evidence, and as new evidence, copies of IRS transcriptions reflecting the procedural tax history of Costa Mesa Fresh LLC / Baja Fresh as EIN [redacted] and of Costa Mesa Fresh Inc. / Baja Fresh as EIN 95-4894231. The transcribed IRS documents do not contain substantive information about either of these entities' net income or net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998, 1999, 2000, or 2001.

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*

---

[2] Prior counsel asserted in an accompanying cover letter that the petitioner's 2002 tax return was also submitted but no 2002 tax return is contained in the record of proceeding.

[3] Ordinary income (loss) from trade or business activities as reported on Line 22.

v. Palmer, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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.[4] 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.

As noted above in the AAO's initial discussion, the petitioner has failed to establish that Costa Mesa Fresh, LLC or Costa Mesa Fresh Inc. are its successors-in-interest. Without such evidence, the record of proceeding does not contain any regulatory-prescribed evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Additionally, there is no regulatory-prescribed evidence at all for 1998, the year of the priority date, and thus the petitioner has failed to establish its ability to pay the proffered wage beginning on the priority date.

The petitioner has not demonstrated that it paid any wages to the beneficiary. Assuming hypothetically that the petitioner could establish that Costa Mesa Fresh, LLC and Costa Mesa Fresh Inc. (Costa Mesa) are its successors-in-interest, then evidentiary evidence concerning both Costa Mesa's and the petitioner's continuing ability to pay the proffered wage is required. The record of proceeding does not contain financial information pertaining to the petitioner, and if counsel's assertion is correct and the petitioner was structured as a sole proprietorship at that time, then the sole proprietor's U.S. Individual Income Tax Return with accompanying Schedule C, Profit or Loss from Business statement should have been submitted into the record of proceeding. The director requested evidence pertaining to 1998 so the petitioner's failure to provide any evidence at all with respect to that year is not excused.

The AAO agrees that IRS-certified copies or IRS computer printouts of Costa Mesa's tax returns, and not just its procedural tax filing history, should be submitted into the record of proceeding to validate the financial

---

[4] 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.

information within those returns. If those figures are confirmed, it would illustrate that Costa Mesa could establish its continuing ability to pay the proffered wage out of its net income since those amounts are larger than the proffered wage in each year. However, as noted above, the record of proceeding is incomplete and thus fails to establish the petitioner's or Costa Mesa's, if Costa Mesa is deemed a successor-in-interest to the petitioner, continuing ability to pay the proffered wage beginning on the priority date.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during any relevant year. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The final issue to be discussed in this case is whether or not the beneficiary is qualified to perform the duties of the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is November 30, 1998. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of assistant manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	0
	College	0
	College Degree Required	None
	Major Field of Study	None

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states "Direct and coordinate activities of workers in food service. Train new employees, prepare work schedules, and monitor work performance. Monitor franchise operations to ensure that procedures are being followed. Evaluate establishment procedures and recommend changes to manager." Item 15 indicates that there are no special requirements.

The beneficiary set forth her credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she indicated that she worked for Villa Italian Specialties in Newport Beach, California, from February 1995 through February 1997 as an assistant manager and described her duties exactly as the description provided in Item 13 of the ETA-750A.

With the initial petition, the petitioner submitted a declaration from the beneficiary that she worked at Villa Italian Specialties (Villa) from February 1995 to February 1997 full-time as an assistant manager but that the Villa is no longer in business. A copy of a Form W-2 issued to the beneficiary from the Villa in 1995 reflects that she was paid wages in the amount of $5,435.75 in that year.

The director requested additional evidence concerning the evidence of the beneficiary's qualifications on July 17, 2003. The director informed the petitioner that the evidence submitted initially was insufficient and requested a letter

on the prior employer's letterhead showing the name and title of the person providing the information, as well as stating the beneficiary's title, duties, dates of employment experience, and hours worked per week.

In response to the director's request for evidence, the petitioner submitted a letter from [redacted] (Mr. [redacted], Vice President of the Villa, on Cento & Fanti Corporation (Cento & Fanti) letterhead, stating that she was employed as a shift manager from 1995 to 1997 performing such duties as customer service, cashier, and "store needs (food cost, labor and opening and closing duties)." [redacted] did not state his employment capacity for the Villa or how he obtained this knowledge about the beneficiary's prior employment at the Villa. Prior counsel stated that additional corroborating evidence, such as "pay statements[,] . . . were misplaced" by the beneficiary and are consequently unavailable.

In his NOID dated December 6, 2003, the director stated that the beneficiary's declaration was insufficient evidence of her prior employment experience and it was inconsistent anyway with the W-2 form submitted into the record of proceeding because she claimed in her declaration that she was employed full-time by the Villa but if the total wages she earned for employment for 11 months in 1995 are divided into an hourly rate, she was paid less than minimum wage. The director also noted that the letter from [redacted] was insufficient evidence of the beneficiary's prior employment experience because it did not provide detailed information about the beneficiary's exact dates of employment at the Villa or [redacted] or Cento & Fanti's connection to the Villa. As noted above, no response was provided in response to the NOID and the petition was denied by the director on January 29, 2004.

On appeal, counsel states that the petitioner obtained a more detailed letter from [redacted] and that the beneficiary should not be penalized by the "unscrupulous business practice" of the Villa by paying her partially in cash because she was without legal immigration status. The petitioner submits a copy of [redacted] prior business card from the Villa showing that he was a General Manager. Counsel stated that the beneficiary found them among her old records on appeal. The petitioner also submits a copy of [redacted] current business card at Cento & Fanti. The new employment experience letter from [redacted] is exactly the same as the prior employment experience letter except that he identified his role with the Villa as General Manager.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO concurs with the director's determination that the petitioner fails to establish that beneficiary's qualifications for the proffered position. [redacted] states that the beneficiary's employment was "shift manager" and indicates that she worked the cashier, customer service, opening and closing the facility, and "establishing food cost [and] labor management." Describing an employment period with such phrases as "shift" and whole years is not

the same as stating that the beneficiary was employment 40 hours per week, full-time, for a specific time period. [redacted] use of whole years without month designations leaves the proscribed period of prior employment unclear to the AAO. The beneficiary could have worked from the last day in 1995 to the first day in 1997, which would be less than two years. [redacted] failure to provide the exact timeframe of past employment does not provide sufficient evidence that the beneficiary has two years of employment experience as an assistant manager. Additionally, counsel's assertion on appeal that the beneficiary's wages are not accurately reflected on the W-2 form is without merit. If the Villa was concerned about employing illegal aliens, it would not have issued a W-2 form for any amount of wages at all. Thus, it is not clear to the AAO why the Villa would issue a W-2 form for partial wages and pay the remainder of the wages the beneficiary earned in cash.

In addition to failing to demonstrate that the beneficiary was employed full-time for two years at the Villa, the description of duties provided by [redacted] does not reflect that the beneficiary has training in the duties specified on Item 13 on the Form ETA-750A. [redacted] did not state that the beneficiary "directed and coordinated activities of workers," "trained new employees or prepared work schedules, and monitored work performance." [redacted] did not state that the beneficiary "monitored franchise operations to ensure that procedures were being followed with recommendations being made to the manager." [redacted] stated that the beneficiary worked as a cashier, opened and closed the facility, provided customer service, and "established food costs [and] labor management." Because of the lack of detail, it is unclear to the AAO that "labor management" was meant to illustrate the beneficiary's experience training employees, monitoring their work schedules, and preparing work schedules. Additionally, nothing in [redacted] letter reflects that the beneficiary obtained employment experience with monitoring franchise operations.

Because the evidence submitted fails to establish with sufficient detail and corroborating documentation that the beneficiary obtained two years of full-time experience as an assistant manager, performing the duties of the proffered position as delineated on Form-ETA 750A, Item 13, the AAO concurs with the director's determination that the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.