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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 30 2007

EAC 04 168 53158

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, Chief
Administrative Appeals Office

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

The petitioner is an information systems and Internet technology firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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.

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

8 C.F.R. § 204.5(g)(2) states:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750

was accepted for processing on May 2, 2002. The proffered wage as stated on the Form ETA 750 is $75,000 per year.

The Form I-140 petition in this matter was submitted on April 29, 2004. On the petition, the petitioner stated that it was established during 1996 and that it employs ten workers. The petition states that the petitioner's gross annual income is $1 million. The petitioner did not state its net annual income in the space provided. On the Form ETA 750, Part B, signed by the beneficiary on April 3, 2002, the beneficiary claimed to have worked for the petitioner since April 2001. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Philadelphia, Pennsylvania.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

In the instant case the record contains (1) the petitioner's 2001, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) a portion of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return, (3) 2002, 2003, and 2004 Form W-2 Wage and Tax Statements, (4) an earnings statement, (5) a letter dated April 20, 2004 from the petitioner's Vice-President of Finance and Administration, (6) a letter dated July 7, 2005 from the petitioner's CPA, and (7) a letter dated July 12, 2005 from the petitioner's president. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on December 28, 1999, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2001 the petitioner reported taxable income before net operating loss deductions and special deductions of $643,488. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $703,055 and current liabilities of $134,612, which yields net current assets of $568,443. This office notes that, because the priority date of the visa petition is May 2, 2002, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2002 the petitioner reported a loss of $575,059 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner reported a loss of $149,104 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

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

During 2004 the petitioner reported a loss of $51,110 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002, 2003, and 2004 W-2 forms show that the petitioner paid the beneficiary wages of $59,158.53, $58,212.83, and $64,272.74 during those years, respectively.

The earnings statement shows that during the two-week pay period ended June 17, 2005 the petitioner paid the beneficiary gross pay of $2,887. That statement also shows that the beneficiary's year-to-date wage total as of June 17, 2005 was $37,534.51. The petitioner's president's July 12, 2005 letter notes that the $37,534.51 paid to the beneficiary during 2005 as of June 17, extrapolated to one year, would exceed the proffered wage.

The vice-president's April 20, 2004 letter states that in his judgment the petitioner has sufficient resources and liquidity to pay the beneficiary the proffered wage. That letter states that the petitioner's loss during 2002, ". . . was a result of the economic reaction to the realization in the markets that companies were overspending on their Information Technology needs, which drove down the price of IT services." That letter also notes the amount the petitioner spent on salaries, including that paid to the beneficiary, and the amount of its depreciation deduction. Finally, that letter notes that the petitioner reports taxes on a cash basis.

The CPA's July 7, 2005 letter states, "The financial health of the [petitioner] has been steadily improving. New senior management has been retained and the prospects for a profitable 2005 is [sic] significant."

The director denied the petition on August 24, 2005.

On appeal, counsel reiterated the petitioner's vice-president's assertion that the petitioner's loss during 2002 was occasioned by demand changes in the information technology field that drove down prices. Counsel further stated that the petitioner's loss during 2003 was occasioned by a move to a new facility, but provided no evidence of any additional expense the move occasioned.

Counsel stated that the petitioner has contracts with the Department of Defense and several large companies, but provided no evidence of the existence of those contracts or that they will be profitable for the petitioner. Counsel also stated that the petitioner's revenue has increased since 2002 and argued that based on the totality of the circumstances of the case the petition should be approved pursuant to the decision in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The issue before this office is whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date pursuant to the requirements of 8 C.F.R. § 204.5(g)(2).

Initially, this office notes that the preparation of the petitioner's tax returns on a cash basis rather than an accrual basis does not make them poor indices of the funds available to the petitioner with which to pay wages. Although tax returns prepared pursuant to cash basis accounting may not facilitate comparing various years to each other, they are at least as good an indicator of the funds that were available to the petitioner during a given year as are returns prepared pursuant to accrual.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[2] or otherwise increased its net income,[3] the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

The amounts of the petitioner's depreciation deductions during various years have no direct bearing on the petitioner's ability to pay the proffered wage during those years. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.[4] Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

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[2] The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

[3] The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

[4] Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

Counsel asserts that, notwithstanding that the petitioner's income tax returns may not, in themselves, demonstrate that it could have paid the beneficiary's wages during the salient years the petition should be approved pursuant to the decision in *Matter of Sonegawa,* 12 I&N Dec. 612. *Sonegawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. The question is whether the evidence in the instant case supports such a finding.

The vice-president's April 20, 2004 letter states that in his judgment the petitioner has sufficient resources and liquidity to pay the beneficiary the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states that an employer of 100 or more workers may be able to demonstrate its ability to pay the proffered wage with a statement from a financial officer of the organization, but makes no such provision for a company that employs ten employees, as the petitioner does. The vice-president's assessment is insufficient to satisfy the requirements of 8 C.F.R. § 204.5(g)(2).

The vice-president's letter further states that the petitioner's loss during 2002, ". . . was a result of the economic reaction to the realization in the markets that companies were overspending on their Information Technology needs, which drove down the price of IT services." More succinctly phrased, the vice president is saying that the demand for his company's services declined during 2002. That statement is insufficient to demonstrate that the decline in the petitioner's profit is uncharacteristic and unlikely to recur.

Counsel states that the petitioner's loss during 2003 was the result of a move by the petitioner to new quarters. This office notes that on the Form ETA 750, filed on May 2, 2002, the petitioner gave its address as 1500 Walnut Street, Suite 800, in Philadelphia. The petitioner gave its address as 1520 Locust Street, Suite 901, also in Philadelphia on the Form I-140 petition, submitted on April 29, 2004. The evidence supports counsel's assertion that the petitioner moved during 2003.

Although the petitioner changed locations during one of the salient years, this case is distinguishable in that in *Sonegawa* the petitioner demonstrated that the move entailed additional nonrecurring expense, paying rent in two locations at once for five months, whereas in the instant case no such evidence was presented. If counsel had presented evidence that the petitioner incurred additional nonrecurring expense during 2003 as a result of

its relocation, or any other cause, this office would have considered that evidence. Counsel's mere assertion that the petitioner's loss during 2003 was occasioned by that move, however, is not evidence and is insufficient to sustain the burden of proof. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980).

The CPA's July 7, 2005 letter states, "The financial health of the [petitioner] has been steadily improving. New senior management has been retained and the prospects for a profitable 2005 is [sic] significant."

The accountant was free to note the evidence upon which he based his opinion. This office would then have considered the evidence and the accountant's opinion, together, to see whether they were sufficient to satisfy the requirements of 8 C.F.R. § 204.5(g)(2).

The only allusion to any basis for his opinion that the petitioner's financial health will improve, however, is the accountant's statement that the petitioner has retained new management. Nothing appears in the record to suggest that the petitioner's management was responsible for its poor performance during the salient years. In fact, that explanation apparently conflicts with the explanation given in the vice-president's April 20, 2004 letter, that the losses were the result of market forces. Further, even if poor management were responsible for the losses, there is no evidence of record, other than the accountant's conclusory statement, to establish that the petitioner's new management is superior and will cause it to be more profitable.

Absent sufficient evidence, the accountant's assertion that the petitioner will be able to pay the proffered wage is nothing more than an unsupported opinion. Determining, on appeal, whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date is the responsibility of this office. This office will not abrogate that duty or assign it to the petitioner's accountant. While this office would willingly have considered any evidence and the accountant's reasoning from that evidence, the conclusion of the accountant, in itself, is of little weight.

The remaining argument pertinent to the petitioner's future performance is counsel's assertion that the petitioner's revenue has increased since 2002. Counsel must, in that statement, mean to refer to the petitioner's net income, as its gross receipts have continued to decline throughout the salient years. Further, because the petitioner suffered a loss during each of the salient years, counsel actually meant to note that the petitioner's losses decreased from $575,058 in 2002 to $149,104 in 2003 and $51,110 in 2004. That the petitioner's losses decreased in 2003 and 2004 is insufficient to presage an inexorable climb to profitability.

The record contains insufficient evidence to demonstrate that the petitioner's business will improve in the future. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. The reasoning of *Sonegawa* does not support approving the instant petition.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS)

requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it paid the beneficiary wages of $59,158.53, $58,212.83, and $64,272.74 during 2002, 2003, and 2004, respectively. The petitioner must show the ability to pay the balance of the proffered wage during those years. The petitioner also demonstrated that it had paid the beneficiary a year-to-date total of $37,534.51 as of June 17, 2005.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)). See also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[5] shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is $75,000 per year. The priority date is May 2, 2002.

[5] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

During 2002 the petitioner paid the beneficiary $59,158.53. The petitioner must show the ability to pay the remaining $15,841.47 balance of the proffered wage. During 2002 the petitioner reported a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary $58,212.83. The petitioner must show the ability to pay the remaining $16,787.17 balance of the proffered wage. During 2003 the petitioner reported a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner paid the beneficiary $64,272.74. The petitioner must show the ability to pay the remaining $10,727.26 balance of the proffered wage. During 2004 the petitioner reported a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during 2004 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petitioner demonstrated that as of June 17, 2005 it had paid the beneficiary year-to-date wages of $37,534.51. That amount is greater than the pro-rata amount of the annual proffered wage the petitioner would have incurred from January 1, 2005 to June 17, 2005.[6] Having paid the beneficiary an amount greater than the proffered wage during that period, the petitioner has demonstrated the ability to pay the proffered wage during that period.

The petition in this matter was submitted on April 29, 2004. On that date the petitioner's 2005 tax return was unavailable. No additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date was subsequently requested. The petitioner is excused from demonstrating its ability to pay the proffered wage during the remainder of 2005 and during subsequent years.

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[6] That is; January 1, 2005 to June 17, 2005 encompasses approximately 24 weeks, and the weekly amount of the proffered wage is $1,442.31 ($75,000/52). If the petitioner had paid the beneficiary the proffered wage during that period it would have paid him $34,615.38 ($1,442.31 x 24). In fact, it paid him $37,534.51, a greater amount.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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

ORDER: The appeal is dismissed.