U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 06 045 50901 Office: NEBRASKA SERVICE CENTER Date: JUN 0 2 2008

IN RE: Petitioner: [redacted]
Beneficiary:

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

The petitioner, Blue Heron Consulting Corporation is a computer consulting and healthcare recruiting agency. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to establish its continuing financial ability to pay the proffered wage and denied the petition accordingly.[1]

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner established its ability to pay the proffered wage. Counsel asserts that the petition should be approved.[2]

Counsel requests oral argument in this matter. Oral argument will be granted only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the written record of proceeding fully represents the facts and issues in this matter. Counsel has identified no unique factors or issues to be resolved. Consequently, the request for oral argument is denied.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS,* 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.

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

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program."

The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is November 30, 2005.

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[1] The director also questions the nature of the job offer to the beneficiary, but does not deny the petition on that basis. This is not at issue on appeal.

[2] The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Therefore these regulations apply to this case because the filing date is November 30, 2005.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate CIS office. Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.

2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

The regulation at 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 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 CIS.

It is noted that the Department of Labor determines whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers. This does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and whether a beneficiary meets the qualifications for the proffered position as set out on the Form ETA 9089. CIS is empowered to make a *de novo* determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS,* 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each

year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). If the preference petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS or November 30, 2005. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is $22.00 an hour or $45,760 per year. On the Form ETA 9089, signed by the beneficiary on August 16, 2005, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), the petitioner claims to have been established in 1999, claims a gross annual income of $5.6 million, an annual net income of $170,981, and currently employs 42 workers.

In support of its ability to pay the proffered wage, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation, for 1999, 2000, 2001, 2003, 2004, and 2005. The 2005 return was provided on appeal and is not addressed by the director in his denial. Except for 1999, the returns indicate that the petitioner uses a standard calendar year to file its tax returns. They contain the following information:

	1999	2000	2001	2003	2004	2005
Net Income[3]	-$ 5,537	-$10,098	-$ 39,099	$319,347	-$207,288	-$216,807
Current Assets	$ 27,392	$46,612	$25,540	$161,701	$ 21,477	$ 47,184
Current Liabilities	$ 36,227	-$72,184	$93,901	$ n/a	$280,691	$540,689
Net Current Assets	-$ 8,835	-$25,572	-$68,361	$161,701	-$259,214	-$493,505

It is noted that as to the continuing ability to pay the proposed wage offer as of the priority date of November 30, 2005, consistent with the requirements of 8 C.F.R. § 204.5(g)(2), the income tax return for 2005 is more relevant to the petitioner's financial position. Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current

[3] Where an S Corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1999-2003) or line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc. This petitioner had additional income or other adjustments from sources other than a trade or business so its net income is reflected on line 23 of its tax returns for 1999, 2000, 2001, 2003, and line 17e for 2004 and 2005.

assets are the difference between the petitioner's current assets and current liabilities.[4] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also provided copies of three compiled financial statements for the years ended in 2001 - 2002; 2003 -2004; and 2004-2005, as well as a compilation covering 2000 to 2004. Additionally submitted is a copy of a "Comprehensive Master Services Agreement" dated July 15, 2004 between the petitioner and TLC Health Network related to the provision of healthcare personnel to TLC by the petitioner, a copy of a February 6, 2006 pricing agreement letter between these two entities,[5] and a copy of an online article, dated November 9, 2003 discussing Rochester's top 100 fastest-growing companies, including mention of the petitioner as the fifth on the list. The petitioner is also described as a technology advisory firm that has recently initiated a business in healthcare recruitment. Schedule B of its tax returns suggest that computer consulting continues to be its primary product or service.

The director denied the petition on September 19, 2006, determining that the petitioner had not established its continuing financial ability to pay the proffered wage of $45,760 per year. The director declined to accept counsel's assertion that the $45.00 per hour that the petitioner would charge the client would generate sufficient profit to cover the proffered wage of $22.00 per hour. The director also concluded that the petition was not eligible for approval based on the finding of *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967), as contended by counsel, because the petitioner's tax returns reflect that the petitioner reported positive net income and net current assets only in 2003.

On appeal, counsel asserts that the director erred in rejecting the compiled financial statements submitted in support of the petitioner's ability to pay the proffered wage. He contends that as they were independently produced certified financial statements and consisted of reliable evidence of the petitioner's ability, they should not have been characterized as the unsupported representations of management that were unreliable. Counsel also maintains that the financial statements serve a different purpose than federal income tax returns which are prepared as part of a filer's tax-avoidance strategy.

Regarding the compiled financial statements provided on appeal that are duplicates of those submitted to the underlying record, it is noted that according to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner

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[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.

[5] The comprehensive agreement pre-dates the filing of the petition in this case. It provides for the petitioner's provision of temporary supplemental labor, temporary to permanent supplemental labor, and direct permanent placement. It is not clear under which arrangement the beneficiary is covered in this case, but it is noted that the pertinent regulatory provisions at 20 C.F.R. § 656.3 provide that the intended employer applying for an alien labor certification must be the entity offering permanent full-time employment to the beneficiary. (*See, In Matter of Smith,* 12 I&N Dec. 772 (Dist. Dir. 1968)). This would exclude an entity merely acting as an employment broker for the actual end-user employer.

relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. A compilation is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). As is the case here, the accountant's own statement accompanying the compilation indicates that the compilation is restricted to financial statement information presented by management and that the statements have *not been audited or reviewed. See Barron's Accounting Handbook*, 37071 (3rd ed. 2000). (Emphasis added.) Their reliability is not based on the accountant's reputation as suggested by counsel, but by the standard disclaimers that appear on all compilations prepared by accountants. Each of the compilations in this case is accompanied by these standard provisions written by the petitioner's accountant, which state in pertinent part:

> A compilation is limited to presenting in the form of financial statements and supplementary schedules information that is the representation of management. We have not audited or reviewed the accompanying financial statements and supplementary schedules and, accordingly, do not express an opinion or any other form of assurance on them.
>
> Management has elected to omit substantially all of the disclosures and the statements of cash flows required by generally accepted accounting principles. If the omitted disclosures and statements of cash flows were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

As such, the compiled financial statements submitted by the petitioner cannot be considered as probative of the petitioner's continuing financial ability to pay a proffered salary as of the priority date of November 30, 2005 and do not overcome the information shown in the federal tax returns. Moreover, we do not believe that the court's reference to "certified" financial statements in clarifying a petitioner's financial position in *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049 (S.D.N.Y. 1986) would oblige an interpretation that elevated compiled financial statements with the kind of disclaimer as shown above over the information contained in the tax return or audited financial statements and is contrary to the current regulatory requirement of the submission of either *audited* financial statements, federal tax returns or annual reports. These evidentiary requirements were added to the subsequent 1991 revisions to the regulation at 8 C.F.R.§ 204.5 based on the implementation of the new provisions contained in section 121 of the Immigration Act of 1990, Public Law 101-649 that took the former third and sixth preference classifications of employment-based immigrant classifications and created five new classifications.[6] Moreover, it is noted that even the 2005 compiled financial statement submitted here reflects a negative net income and an excess of current liabilities over current assets and does not support the petitioner's ability to pay.

Counsel also suggests that the petitioner has over $600,000 in retained earnings. It is not clear the source of this figure. Moreover, retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore

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[6] *See* 56 FR 60897-01, 1991 WL 249981 containing final rule implements (November 29, 1991) to the employment-based immigrant provisions. Prior regulations did not contain specific evidentiary provisions related to the ability to pay a proffered wage that appear in 8 C.F.R. 204.5(g)(2) as set forth above.

duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.[7]

Counsel also asserts that the beneficiary's employment should also be considered as a factor in its ability to pay the proffered wage as she will be billed out at $45.00 per hour and will earn a wage of $22.00 per hour and will therefore add to the employer's income. Counsel disputes the director's denial in this regard and cites *Masonry Masters, Inc. v. Thornburgh,* 742 F.Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. It is noted that the court in *Masonry Masters* was primarily concerned with the former INS' attempt to estimate the prevailing wage during a period where the wage had not been designated by the DOL. *Id.* at 684-685. The court's decision also included a criticism of the former INS' approach to analyzing the petitioner's ability to pay a proffered wage and its hope that the INS would reveal what its theory was.

Although it is recognized that the petitioner plans to bill out the beneficiary's services at an amount that exceeds the proffered wage, as the director noted, the additional costs of employing the beneficiary would at least in part offset the gross income that the beneficiary's employment would generate. It is unknown if the amount remaining would be sufficient to cover the payment of the proffered wage, otherwise businesses engaged in the placement of contract workers would be profitable. This hypothesis does not outweigh the evidence submitted in the petitioner's tax return for 2005. Moreover, as referenced above, the evidentiary guidelines that CIS considers that the court in *Masonry Masters* expressed concern about are encompassed in the current regulation set forth at 8 C.F.R § 204.5(g)(2). While the beneficiary's projected assignment may represent possible future revenue, it does not establish the petitioner's continuing financial ability to pay the proffered wage beginning as of the priority date within the requirements of the regulation at 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, there is no evidence that the petitioner has employed the beneficiary.

If the petitioner does not establish that it employed and paid the instant beneficiary in an amount at least equal to the proffered wage from the priority date onwards, 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, supra,* (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*,

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[7] Even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use.[7] Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

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) and *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105,(D. Mass. 2007).

Showing that the petitioner's gross receipts exceeded the proffered wage is not sufficient. Also, showing that the petitioner paid wages in excess of the proffered wage is not sufficient. 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.

Counsel also relies upon the principles set forth in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). It is noted that in some cases that petitioners who have experienced unique and unusual business circumstances may be deemed to qualify for approval under the principles set forth in *Matter of Sonegawa* based on a petitioner's history of performance that supports its reasonable expectations of increasing profit. That case however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner, that had been in business for 11 years, changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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 the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, while the online media article published in 2003 cited the petitioner's successful local reputation as a Rochester employer, it is noted that out of the six federal income tax returns provided, 2003 was the only year in which the petitioner reported a positive net income and net current assets. The remaining five years, including the year of filing, 2005, represented net income losses and negative net current assets. It cannot be concluded that this circumstance represents a framework of established success similar to *Sonegawa,* or that the petitioner has demonstrated that such unusual circumstances exist in this case, which are analogous to the facts set forth in that case.

In this case, the 2005 corporate tax return reflects that the petitioner reported -$216,807 in net income and net current assets of -$493,405. This does not reflect sufficient funds to cover the proffered wage of $45,760 per year and does not establish the petitioner's continuing ability to pay the proffered wage as of the priority date. It is further noted that the petitioner has submitted 97 I-140 petitions from 2003 to 2007. Where multiple petitions are filed by a petitioner, the petitioner must demonstrate the ability to pay the proffered salaries as of the priority date for all of the pending petitions.

Beyond the decision of the director, it is noted that the notice of posting of the job opportunity intended to be posted in a conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment, failed to contain an accurate and complete address of the Department of Labor Certifying Officer location where individuals may provide documentary evidence bearing on the application for certification under 20 C.F.R. § 656.10(d)(3)(iii). According to the DOL's Frequently Asked Questions (FAQs) found online at http://www.foreignlaborcert.doleta.gov/faqs.cfm, (Question 3 under Notice of Filing and Question 4 under How to File) the address of the DOL certifying officer for New York is located at:

United States Department of Labor
Employment and Training Administration
Atlanta National Processing Center
Harris Tower
233 Peachtree Street, N.E. , Ste. 410
Atlanta, Georgia 30303

It is further noted that the ETA Form 9089 was not submitted in duplicate as required by regulation. *See* 8 C.F.R. § 204.5 (l)(3)(i).

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*, 299 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.