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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 29 2008

SRC 06 273 51452

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.

for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The nature of the petitioner's business is e-commerce distribution. It seeks to employ the beneficiary permanently in the United States as a marketing director. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. 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.

As set forth in the director's denial dated December 19, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 either 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 19, 2004.[1] The proffered wage as stated on the Form ETA 750 is $48.72 per hour ($101,337.60 per year). The Form ETA 750 states that the position requires four years of experience in the proffered position or four-years experience "as sales & marketing."

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

Relevant evidence in the record includes the following: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2004 and 2005; California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for two quarters of 2006 that were accepted by the State of California; California Employment Development Department (EDD) Form DE-7, annual payroll summaries for 2004, stating total wages paid $174,679.12, and for 2005, stating total wages paid $137,151.01 along with IRS Form W-3 for the same years; a letter dated January 15, 2007 from the petitioner by John Glascock, president; copies of web pages from the petitioner's website at www.worldlanguage.com; printed materials concerning the petitioner's business entitled "World Language Resources, International Software Buyer's Guide;" the petitioner's Wells Fargo business checking accounts statements dated January 17, 2007, and January 18, 2007; the petitioner's business plan;[3] and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1996 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net

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[1] It has been approximately four years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

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

[3] Counsel's reliance on unaudited financial records is misplaced. There is no indication that the business plan submitted by the petitioner, which is generally forwarded looking, relies on audited financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

annual income and gross annual income were not stated on the petition. On the Form ETA 750, signed by the beneficiary on May 31, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal counsel asserts that the petitioner is a fast growing company; is expected to realize $105,000.00 and $130,000.00 in net taxable income for 2006 and 2007 calendar year respectively; anticipates even greater net taxable income in year 2007 as reported to counsel by the petitioner's accountant; and "is poised to continue to build on its fantastic profitability in the near and long-term future." The assertion that counsel has received an opinion concerning the petitioner's future financial prospects from petitioner's accountant without the introduction of independent, objective evidence is not evidentiary.

Counsel has not submitted the petitioner's tax return for 2006 although there was ample time to do so.[4]

Counsel states on appeal and has provided the petitioner's Wells Fargo checking account statements to demonstrate that the petitioner "has already earmarked over $250,000.00 in salary in a special bank account to ensure that [the beneficiary's] salary is being met for the foreseeable future." Since the checking account statements submitted by counsel are dated January 17, 2007, and January 18, 2007, they cannot be proof of the petitioner's ability to pay the proffered wage on the priority date, July 19, 2004. Further without supporting documentary evidence, such as an escrow agreement referencing the checking account and its purpose, a lock-box agreement with Wells Fargo bank to prevent the petitioner from invading the account for other purposes, and an agreement between the petitioner and the beneficiary that the earmarked funds are solely to pay the beneficiary's wages, there is no evidence that there is a legal obligation for the petitioner to pay and the beneficiary to receive the earmarked funds rather than, for example, to utilize the funds in the ordinary course of business for expenses.

According to counsel the beneficiary is a "world-renowned marketing director."[5] According to the petition, the beneficiary arrived in the United States on April 28, 1990. Consolidated with this proceeding, there is a prior employment based petition filed for the beneficiary by an employer that sought to employ the beneficiary permanently in the United States as a general car mechanic.[6] According to the labor certification accompanying the petition in that former case, the beneficiary is a general automotive mechanic having attended the Carrington Technical Institute in New Zealand from 1982 to 1987 from which the beneficiary received a labor certificate (described in a letter from [redacted] of Auckland, New Zealand, dated May 21, 2001, as a national certification of apprenticeship as a mechanic). Doubt cast on any aspect of the petitioner's

[4] Counsel has contended in his appeal brief that the petitioner *is expected to realize* over $105,000 in net taxable income for 2006 and later states that in 2006 the company *realized* that net taxable income, but has not introduced the petitioner's 2006 income tax return. Proof is demanded of facts that were asserted but are not in evidence.

[5] According to counsel, the petitioner has "consulted" the beneficiary on methods to save the petitioner's expenses, it is unclear why counsel is asserting that the petitioner's use of the beneficiary's services as a consultant is evidence of the petitioner's ability to pay the proffered wage. Other than counsel's unsupported assertion, there is no evidence in the proceeding that the beneficiary was actually employed and paid as an independent contractor by the petitioner. Further, in this instance, no documentation has been provided to explain how the beneficiary's employment as a marketing director will significantly increase petitioner's profits. Counsel has only introduced two years of tax returns and as will be shown, the petitioner had insufficient net income and net current assets to pay the proffered wage. Counsel's hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

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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).

According to that former labor certification, the beneficiary also was employed as an auto mechanic for [redacted] New Zealand from January 1982 to August 1990. According to that labor certification, the beneficiary was unemployed from October 1993 to October 1996. By training, education and prior employment, the beneficiary was a general car mechanic not a marketing director prior to entering the United States. There is no evidence in the proceeding that the beneficiary is a world-renowned marketing director or how this assertion relates to the issue at hand which is the petitioner's ability to pay the proffered wage. If this matter proceeds further, these issues should be examined.

Counsel asserts that because the petitioner has "over a half dozen employees in all" the petitioner "clearly possesses the ability to pay" the beneficiary the proffered wage of $101,337.60 per year. In contradistinction to the above statement, counsel states in his appeal brief that the employer employs "12 multilingual staff members." The California Employment Development Department (EDD) Form DE-7, annual payroll summaries for 2004 and for 2005 state that there are only six employees. 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). The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages paid to others cannot be used to prove the ability the ability to pay the proffered wage.

Relying upon a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, counsel asserts that an adjudicator should make a positive determination when the petitioner's net income is equal to or greater than the proffered wage. Counsel asserts that since the petitioner will make $105,000.00 and $130,000.00 in net taxable income for 2006 and 2007 that according to the language in the memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date.

Counsel's interpretation of the language in that memorandum is overly broad and it does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If Citizenship and Immigration Services (CIS)and the AAO were to interpret and apply the memorandum as counsel urges, then in this particular factual context, although the petitioner has not demonstrated its ability to pay the proffered wage, that if the petitioner surmises that in the future it may or will attain sufficient net income that would be 'proof" of the ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date,[7] which in this case is July 19, 2004. Thus, the petitioner must show its ability to pay the proffered wage not only in 2004, but it must also show its continuing ability to pay the proffered wage in 2005 and thereafter until receipt by the beneficiary of the permanent residence visa.

Counsel advised that the beneficiary will replace "an array of advisors with diverse experience in the creation and sale of foreign-language products. Form 1040,[8] Statement 2." The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner could replace them with the beneficiary. Wages and compensation already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The

[7] 8 C.F.R. § 204.5(g)(2).
[8] No Form 1040 returns were submitted in the record.

petitioner has not documented the position, duty, and termination of the advisors who performed the duties of the proffered position. If those advisors performed other kinds of work, then the beneficiary could not have replaced him or her. No proof of compensation actually paid by MISC- 1099s statements to non-employees was submitted by counsel. No proof was submitted that the beneficiary was actually employed and paid as an independent contractor by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 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). In evaluating whether a job offer is realistic, 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 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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 supported by federal case law. *See 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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2004, the Form 1120 stated net income of $1,714.00.
  In 2005, the Form 1120 stated net income of <$15,176.00>.[9]

Since the proffered wage is $101,337.60 per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2004 and 2005.

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[9] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

If the net income the petitioner demonstrates it had available during the 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.[10] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. **Its year-end current liabilities are shown on lines 16 through 18. If the total of a** corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2004 and 2005 were <$125,922.00> and <$97,757.00>.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[11] copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel states in his brief to support the appeal that under the regulation at 8 C.F.R. § 204.5(g)(2) ability to pay is measured at the time the job is initially offered from the priority date of the labor certification until the beneficiary obtains lawful permanent residence. Counsel is correct.

Counsel on appeal has submitted a brief that has propounded several pages of assertions and contentions not discussed above taken from the petitioner's business plan submitted into evidence. Counsel in his legal brief, besides the contentions discussed above, has discoursed on the petitioner's business model, the market for its services, its marketing plan, the petitioner's sales generated through its internet website, its information systems, its competitors, its products and projected financial growth. As noted above, the single issue in this

[10] 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.
[11] 8 C.F.R. § 204.5(g)(2).

case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Without documentary evidence to support those claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). We will review those assertions and contentions for which counsel has submitted relevant substantive, independent and object evidence for support in the record of proceeding.

Counsel refers to decisions issued by the AAO that, according to counsel, CIS "often mischaracterizes corporations as having low operating profit" to reduce corporate taxes but does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Counsel also refers to federal court case, *O'Conner v. Attorney General*, 1987 WL 18243 (Mass). We note that the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

On appeal, counsel cites *Ranchito Coletero*, 2002-INA-104 (BALCA 2004) for the premise that although the petitioner has insufficient net income or current net assets to pay the proffered wage in 2004 and 2005, certain entities may still have the ability to pay the proffered wage. [redacted] involves entities in an agricultural business that regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

Likewise, counsel is cites *Matter of Sonegawa,* 12 I&N Dec. at 612 for the proposition that the petitioner's "over-all" financial position must be considered in the determination of the ability to pay the proffered wage. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. 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 the 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 the petitioner's sound business reputation and outstanding reputation as a couturiere.

In 2004, the petitioner's Form 1120 stated net income of $1,714.00 and in 2005, the stated net income was <$15,176.00>. **The petitioner's net current assets during 2004 and 2005 were <$125,922.00> and** <$97,757.00> respectively. Since the proffered wage is $101,337.60, at no time did the petitioner demonstrate its ability to pay the proffered wage. Although the regulation 8 C.F.R. § 204.5(g)(2) stated that besides tax returns, audited financial statements and annual reports would be acceptable evidence, the petitioner failed to submit additional evidence. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2004 and 2005 were uncharacteristically unprofitable years for the petitioner. Counsel has contended throughout his argument that the petitioner will be able in the future pay the proffered wage, but offers no explanation how the petitioner could pay the proffered wage for 2004 and 2005. Since no tax returns were submitted for tax periods after 2005, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.