U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

Date: JAN 05 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Texas Service Center, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal on October 28, 2009. On November 27, 2009, a new entity filed a motion to reopen and to reconsider the AAO's decision. The AAO dismissed the motion on July 28, 2010. The petitioner then filed a second motion to reopen on August 23, 2010. The AAO reopened its decision dismissing the appeal. Upon review, the appeal will be dismissed.

The petitioner owns and runs an office building.[1] It seeks to employ the beneficiary permanently in the United States as a janitor responsible for building maintenance, cleaning, security, and trash or recycling removal, pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).[2] As required by statute, the petition is accompanied by an Application for Alien Employment Certification (Form ETA 750), approved by the United States Department of Labor (DOL). The director, Texas Service Center, denied the petition, finding that the petitioner did not have sufficient net income to pay the beneficiary's wage, specifically in the year 2007.

The petitioner subsequently appealed the director's decision to the AAO. On appeal, counsel for the petitioner merely stated that the petitioner had the ability to pay. The AAO summarily dismissed the appeal. A company called [redacted] then filed a motion to reopen and reconsider with the AAO. The AAO determined that the party filing the motion to reopen was not "the affected party" as defined by the regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) and did not have standing in the proceeding. Accordingly, the motion was dismissed. On August 26, 2010, [redacted] filed the instant motion to reopen.

On the latest motion, counsel contends that the petitioner sold the assets of the enterprise to [redacted] and that subsequently, [redacted] became the sole managing enterprise for the building and that the two companies are successors-in-interest to the original petitioner.

The record shows that the motion is properly filed and timely and makes 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.

The primary issues in this case are (1) whether or not the petitioner has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives his lawful

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[1] The building is located at [redacted]

[2] Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

permanent residence, and (2) whether the petitioner has established that [redacted], are its successors-in-interest.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal/motion.[3]

With respect to the first issue concerning the petitioner's ability to pay, 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 was accepted for processing by any office within the employment system of the DOL. *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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 was filed for processing and accepted by the DOL on January 8, 2004. The prevailing wage or the proffered wage specified on the Form ETA 750 is $776.80 per week or $40,393.60 per year (based on a 40-hour work per week). The Form ETA 750 states that the position requires a minimum of one year of experience in the job offered or in a related occupation as a maintenance worker.

To show that the petitioner has the continuing ability to pay $776.80 per week or $40,393.60 per year from January 8, 2004, the petitioner submitted copies of the following evidence:

- [redacted] individual tax returns filed on Forms 1040, U.S. Individual Income Tax Return, for tax years 2004, 2005, and 2007;
- A list of [redacted] household expenses for the year 2004;

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[3] The submission of additional evidence on appeal is allowed by the instructions to the 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/motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

- Federal tax returns of [redacted] filed on IRS Forms 1065, U.S. Return of Partnership Income, for tax years 2005 through 2009;
- [redacted] federal tax returns (Forms 1120S, U.S. Income Tax Return for an S Corporation) for tax years 2005 through 2010; and
- The beneficiary's Forms W-2 issued by [redacted] from 2004 to 2008.

On motion, counsel states that the petitioner – [redacted] – was originally a business structured as a sole proprietorship established by [redacted] and [redacted] in 1974. Counsel indicates that after [redacted] died, the business was continued by [redacted]

Counsel further indicates that in September 2004 [redacted] set up a new entity called [redacted] to handle the business. On October 6, 2004, [redacted] then deeded the real property to [redacted] the former son-in-law of [redacted] claims in the sworn statements dated May 19, 2011 and August 10, 2010 that [redacted], formed on August 22, 2003, has been the sole managing enterprise for the building located at [redacted] since the transfer of the property by [redacted] to [redacted][4] [redacted] states that upon the advice of their attorneys, a separate LLC was set up to manage the [redacted] properties, that [redacted] took over the management and staff of [redacted] and that in 2005, the beneficiary began to work for [redacted]

To support these assertions, the petitioner submitted copies of the following evidence:

- A deed for the property located at [redacted] granted to [redacted] on September 30, 1974;
- Certificate of Formation of [redacted] dated September 21, 2004;
- Operating Agreement of [redacted] dated October 1, 2004;[5]

[4] A review of the tax returns submitted above reveals that in 2005 following the transfer of the real property from [redacted] to [redacted], [redacted] owned 75% and [redacted] owned 25% of [redacted] and that [redacted] owned 100% of [redacted] The different ownership of the two LLCs at the inception detracts from counsel's implicit argument that [redacted], as a business strategy, formed the LLCs as equal successors in interest, one of the LLCs to own the property and the other to manage it.

[5] This agreement indicates that the [redacted] was 100% capitalized by [redacted]

- A deed dated October 6, 2004 transferring ownership and conveying the real property located at [redacted], from [redacted] to [redacted]
- A durable general power of attorney dated May 5, 2004 authorizing [redacted] to act on behalf of [redacted] in the management of [redacted] property and business;
- A statement signed by [redacted] on August 10, 2010 stating that he is the former son-in-law and attorney-in-fact of [redacted] and that the beneficiary has been an employee of the petitioner, its successor entity, and [redacted] since 2005;
- Tax identification number [redacted] issued by the Internal Revenue Service (IRS) to [redacted];
- Tax identification number [redacted] issued by the IRS to [redacted] on October 14, 2004; and
- A sworn statement dated May 19, 2011 from [redacted], who attests that he is the sole owner of [redacted] and further describes the formation of the entities and the relationship between the petitioner and the beneficiary and subsequently between [redacted] and the beneficiary.

In the instant proceeding, the record shows that both the Form ETA 750 and the Form I-140 petition were filed by [redacted]. Based on the evidence submitted above, the AAO also finds that [redacted] personally owned real property located at [redacted], and received rental income from the property in 2004, 2005, and 2007.

On the Form I-140 under Part 1, the petitioner listed the following Internal Revenue Service (IRS) Employer Identification Number (EIN): [redacted]. [redacted], the former son-in-law of [redacted] and the person in charge of [redacted] business and properties, indicates in his letter dated August 10, 2010 that the name '[redacted]' was in error or an oversight, as the business had never been incorporated. [redacted] asserts that [redacted], operating as a sole proprietor, paid salaries under the EIN number, [redacted].

The AAO observes, in adjudicating the appeal, however, that although [redacted] owned the real property located at [redacted], at the time of filing the Forms ETA 750 and I-140, it is not clear whether she owned [redacted] with IRS Tax Number or EIN [redacted] as a sole proprietor or that she is the petitioner. A review of [redacted] tax returns, for instance, does not show that she had a business with EIN [redacted] or that she filed a Schedule C (Profit or Loss from Business). On Schedule E (Supplemental Income and Loss) of her Form 1040, [redacted] also did not list EIN [redacted].

As noted above, [redacted] power-of-attorney [redacted] stated that [redacted] used the EIN number individually to pay employees, but no documentation had been submitted to demonstrate the veracity of that statement. 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)). As such, the AAO rejects the petitioner's assertions which indicate that [redacted] operated a business enterprise named [redacted]. with the EIN number [redacted] The petitioner has not established its identity as [redacted] individually.

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, United States Citizenship and Immigration Services (USCIS) 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, USCIS 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.

Here, the record contains no Form W-2 or 1099-MISC issued by [redacted] with the EIN number [redacted] to the beneficiary. A review of the record reflects that the beneficiary has been employed by [redacted] since 2004 and that [redacted] and [redacted] each have the ability to pay the proffered wage from 2004 to 2009. Similarly, the Form 1040 individual tax returns of [redacted] indicate that she has the ability to pay the proffered wage from 2004 to 2009.

However, none of these entities has been established to be the petitioner, or the successor-in-interest to the petitioner. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The record does not contain any tax return of the petitioner, [redacted], and does not reflect that the petitioner has paid wages to the beneficiary. For this reason, the petitioner has not established that it has the ability to pay the proffered wage from the priority date.

With regards to the second issue concerning succession of the business to [redacted] and/or [redacted] we have noted earlier in the Request for Evidence dated April 7, 2011 that neither [redacted] nor [redacted] has standing in this unless it can demonstrate by a preponderance of the evidence that it is the successor-in-interest to the petitioner. Counsel in his brief dated August 18, 2010 states that [redacted] is the sole managing enterprise for the building and that [redacted] and [redacted] are the successors-in-interest to the petitioner.

Upon *de novo* review and based on the evidence submitted, the AAO finds that neither [redacted] individually, [redacted] nor [redacted] is the successor-in-interest to the petitioner. No documents of record establish [redacted] relationship to the petitioner, [redacted], or the nature or structure of the petitioner's business. The documents of record establish that that there was a transfer of property from [redacted] individually to the [redacted] in 2004. The deed dated October 6, 2004 transferred the ownership and conveyed the real property located at [redacted] to [redacted] The transfer documentation however, is not from [redacted] or the petitioner. As noted above, the record does not show that [redacted] as a sole proprietor is the petitioner, or that she individually received a transfer of the business assets of or transferred assets to the petitioner. No transfer of property has been established from the petitioner to [redacted] or to [redacted]

Nor does the record establish that [redacted] is a successor-in-interest to the petitioner, or to [redacted][6] The Operating Agreement of [redacted] does not mention [redacted], nor does it appoint [redacted] as the petitioner's, or [redacted], agent or its management company. The record also contains no formal agreement between [redacted] and [redacted], or other documentation showing that [redacted] became the sole managing enterprise for the petitioner or for [redacted]. There is no corroborating documentation supporting counsel's or [redacted] claim that [redacted] and [redacted] are the successor entities to the petitioner, [redacted] 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)).

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[6] The record establishes the transfer of real property from [redacted] individually to [redacted] The AAO will not address whether this transfer accomplished a successorship from [redacted] to [redacted], as [redacted] is not established as the petitioner in this case. The record does not contain any documentation transferring ownership of the petitioner to [redacted] individually.

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

> Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations*, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

Here, the AAO strictly interprets *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed "all" of the original employer's rights, duties, obligations, and assets. The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved . . . ." *Id.* (emphasis added).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.[7] *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.[8]

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law.

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[7] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

[8] For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[9] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

In this case, the evidence fails to demonstrate that [redacted] is the petitioner or that [redacted] and/or [redacted] are the successors-in-interest to the petitioner. As noted above, the petitioner, [redacted] with EIN number [redacted], has not established its relationship with [redacted] or that it transferred property to [redacted], [redacted] or [redacted]. [redacted] conveyance of the real property to [redacted] does not prove the petitioner's transfer of its assets.

[9] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

Further, there is no transfer of ownership from the petitioner, or from [redacted], to [redacted] and no agency contract or agreement between [redacted] and [redacted] specifically stating that [redacted] will be the managing enterprise for [redacted] properties. Nor is there any indication that [redacted], [redacted] or [redacted] is vested with the rights, duties, and responsibilities of the petitioner. For these reasons, the petitioner has not established that [redacted] is the petitioner, or that [redacted] and/or [redacted] are its successors-in-interest. As such, the petitioner has not established that the wages paid to the beneficiary can be attributed to the petitioner and that the petitioner has the ability to pay the proffered wage from the priority date.[10]

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. Accordingly, the appeal is dismissed.

ORDER: The appeal is dismissed.

[10] The AAO also notes that the petition cannot be approved if the petitioner no longer has any intent to permanently employ the beneficiary in the U.S.