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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship and Immigration Services

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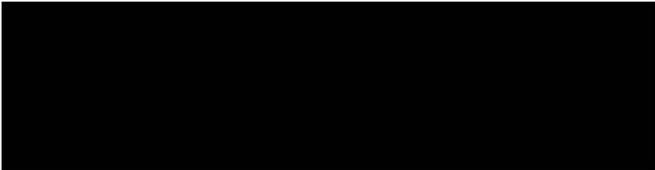


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JAN 26 2010
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a research institute. It seeks to classify the beneficiary as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The petitioner seeks to employ the beneficiary permanently in the United States as a research scientist. The director determined that the petitioner had not established that the beneficiary had attained the outstanding level of achievement required for classification as an outstanding researcher.

On appeal, counsel submits a brief. For the reasons discussed below, we uphold the director's decision.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(B) Outstanding professors and researchers. -- An alien is described in this subparagraph if --

- (i) the alien is recognized internationally as outstanding in a specific academic area,
- (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
- (iii) the alien seeks to enter the United States --

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons

full-time in research activities and has achieved documented accomplishments in an academic field.

The regulation at 8 C.F.R. § 204.5(i)(3) states that a petition for an outstanding professor or researcher must be accompanied by:

(ii) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field. Experience in teaching or research while working on an advanced degree will only be acceptable if the alien has acquired the degree, and if the teaching duties were such that he or she had full responsibility for the class taught or if the research conducted toward the degree has been recognized within the academic field as outstanding. Evidence of teaching and/or research experience shall be in the form of letter(s) from current or former employer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien.

This petition was filed on May 13, 2008 to classify the beneficiary as an outstanding researcher in the field of mechanical engineering. Therefore, the petitioner must establish that the beneficiary had at least three years of research experience in the field as of that date, and that the beneficiary's work has been recognized internationally within the field as outstanding. The beneficiary obtained his Master's degree in 2002. He has been working for the petitioner as a research scientist since January 2005, more than three years prior to the filing date. At issue then is whether the petitioner has established that the beneficiary's work has been recognized internationally within the field as outstanding.

The regulation at 8 C.F.R. § 204.5(i)(3)(i) states that a petition for an outstanding professor or researcher must be accompanied by "[e]vidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition." The regulation lists six criteria, of which the beneficiary must satisfy at least two. It is important to note here that the controlling purpose of the regulation is to establish international recognition, and any evidence submitted to meet these criteria must therefore be to some extent indicative of international recognition. More specifically, outstanding professors and researchers should stand apart in the academic community through eminence and distinction based on international recognition. The regulation at issue provides criteria to be used in evaluating whether a professor or researcher is deemed outstanding. *Employment-Based Immigrants*, 56 Fed. Reg. 30703, 30705 (proposed July 5, 1991) (enacted 56 Fed. Reg. 60897 (Nov. 29, 1991)). The petitioner claims to have satisfied the following criteria.¹

¹ The petitioner does not claim that the beneficiary meets any criteria not discussed in this decision and the record contains no evidence relating to the omitted criteria.

Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field.

Initially, the petitioner submitted a letter from officials at the petitioning institute advising the beneficiary of his selection as the petitioner's Fiscal Year 2006 Emerging Scientist. In response to the director's request for additional evidence, the petitioner submitted the award criteria, which reveal that the award is limited to the petitioner's employees who have less than five years of service. While the award may recognize an innovative contribution of major significance, it may also simply recognize contributions to a client's project or even simply professional growth as evident from publications and presentations. While not specified as relevant to this criterion, the petitioner also submitted patents listing the beneficiary as a contributing inventor.

The director concluded that an internal company award cannot serve to meet this criterion and that patents are not awards or prizes. On appeal, counsel asserts that because the petitioner is "one of the world's leading research institutions," its employee awards demonstrate the beneficiary's recognition as one of the leading researchers in the field. Counsel further notes that the patents were not submitted to meet this criterion.

It is significant that the *proposed* regulation relating to this classification would have required evidence of a major *international* award. The final rule removed the requirement that the award be "international," but left the word "major." The commentary states: "The word "international" has been removed in order to accommodate the *possibility* that an alien might be recognized internationally as outstanding for having received a major award that is not international." (Emphasis added.) 56 Fed. Reg. 60897-01, 60899 (Nov. 29, 1991.)

Thus, the standard for this criterion is very high. The rule recognizes only the "possibility" that a *major* award that is not international would qualify. Significantly, even lesser international awards cannot serve to meet this criterion given the continued use of the word "major" in the final rule. *Cf.* 8 C.F.R. § 204.5(h)(3)(i) (allowing for "lesser" nationally or internationally recognized awards for a separate classification than the one sought in this matter).

We concur with the director that an internal company award, even at a prestigious company, cannot generally serve to meet this criterion. Moreover, competition for the award is limited to employees with less than five years of service. Thus, we are not persuaded that the award is a major award in the field. We also agree with the director that a patent is a property right, not an award for excellence, but we acknowledge that the patents were not submitted to meet this criterion.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation.

Initially, counsel asserted that articles which cite the beneficiary in addition to numerous other researchers serve to meet this criterion. In response to the director's request for additional evidence, the petitioner submitted additional citations, an article at www.laboratory.com authored by another employee at the petitioning institution that quotes the beneficiary and articles about the petitioner in the *Columbus Dispatch*. The director concluded that the petitioner had not submitted evidence to meet this criterion.

On appeal, counsel relies on a July 30, 1992 correspondence memorandum from [REDACTED] to the then Director of the Nebraska Service Center, [REDACTED]. [REDACTED] issued his correspondence memorandum in response to an inquiry from [REDACTED] and makes clear that he is discussing his personal inclinations. Moreover, in contrast to official policy memoranda issued to the field, correspondence memoranda issued to a single individual do not constitute official U.S. Citizenship and Immigration Services (USCIS) policy and will not be considered as such in the adjudication of petitions or applications. Although the correspondence may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

In his letter to [REDACTED] raised concerns about more than one criterion. Specifically, he noted that "it is almost a job requirement at many universities that professors and researchers publish papers." Separately, [REDACTED] questioned whether citations were published material about the cited author. In his response, [REDACTED] unequivocally states that "a footnoted reference to the alien's work without evaluation . . . would be of little or no value." [REDACTED] goes on to state that "entries (particularly a goodly number) in a field . . . would more than likely be solid pieces of evidence." Contrary to counsel's assertion on appeal, however, [REDACTED] does not identify the criterion to which this evidence would relate.

The plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(C) requires published material about the alien's work. Articles which cite the beneficiary's work are primarily about the author's own work or recent trends in the field, not the beneficiary's. As such, they cannot be considered published material about the beneficiary and, thus, cannot serve to meet the plain language of this criterion. The other materials are also not primarily "about" the beneficiary's work and the record contains no evidence that they appear in qualifying professional publications.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field.

Initially, the petitioner submitted a March 13, 2008 memorandum from Constella Group addressed to "peer review participant" regarding the National Institute for Occupational Safety and Health (NIOSH) peer review program. A Constella Group work order lists the beneficiary as a consultant on one of the NIOSH panels. **The beneficiary would be paid \$100 per review with a \$300 maximum.** The consultants' task was to submit a "brief written critique" of grant proposals. The petitioner also submitted an electronic mail message dated September 6, 2007 from the Indo-U.S. Science and Technology Forum at the Smithsonian Institute asking whether the beneficiary would be willing to provide some comments on a grant proposal.

In response to the director's request for additional evidence, the petitioner submitted a letter from [REDACTED] at Grant Statistical Service asserting that in 2008 he served as a scientific review administrator for Constella Group and coordinated the scientific peer review of proposals. [REDACTED] asserts that panel members reviewed provisionally approved grants and were selected based on professional and academic merit through in-depth knowledge of nanotechnology as demonstrated by published literature and a lack of conflicts of interest. The beneficiary was one of 12 reviewers and reviewed one proposal. In addition, [REDACTED] of the Smithsonian Institution, asserts that proposal reviewers are selected based on their recognized technical expertise and that the beneficiary was one of six experts invited to review a specific grant proposal and that his recommendation was used to make a final decision on the proposal. The petitioner also submitted a letter evidencing an internal review by the beneficiary at the petitioning institute and letters inviting the beneficiary to serve as an editor by Nova Publishing and Bentham E-Books. The latter invitation postdates the filing of the petition. The record contains no evidence that the beneficiary actually served as an editor for either entity.

The director concluded that peer review is routine and cannot serve to meet this criterion. On appeal, counsel notes that the beneficiary was invited to serve as an editor. As noted above, however, the record contains no evidence that the beneficiary actually served as a credited editor. The regulation at 8 C.F.R. § 204.5(i)(3)(i)(D) requires the beneficiary's actual participation as a judge. Moreover, as also stated above, the invitation from Bentham E-Books postdates the filing of the petition. The petitioner must establish the beneficiary's eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katighak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

Counsel also relies on the memo from [REDACTED] for the proposition that peer review constitutes solid evidence for this classification. As stated above, [REDACTED] makes clear that he is only discussing his personal inclinations. We reiterate that, in contrast to official policy memoranda issued to the field, correspondence memoranda issued to a single individual do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

The record reflects that the beneficiary reviewed one provisionally approved grant proposal for Constella Group as a contractor for NIOSH and one proposal in response to an electronic-mail request from one individual at the Smithsonian Institute. [REDACTED] does not suggest that Constella Group reviewers stand apart in the academic community through eminence and distinction based on international recognition. Significantly, the beneficiary provided a brief critique and was not responsible for making the final selection of approved proposals. The beneficiary's role with the Smithsonian Institute appears to have been in an informal capacity at the request of one employee at the institute. Without evidence that sets the beneficiary apart from others in his field we cannot conclude that the beneficiary meets this criterion.

Evidence of the alien's original scientific or scholarly research contributions to the academic field.

The director considered the reference letters and the beneficiary's publications and concluded that they did not establish the beneficiary's impact in the field. On appeal, counsel asserts that the letters support the patents and the internal company award.

Obviously, the petitioner cannot satisfy this criterion simply by listing the beneficiary's past projects and demonstrating that the beneficiary's work was "original" in that it did not merely duplicate prior research. Research work that is unoriginal would be unlikely to secure the beneficiary a master's degree, let alone classification as an outstanding researcher. Because the goal of the regulatory criteria is to demonstrate that the beneficiary has won international recognition as an outstanding researcher, it stands to reason that the beneficiary's research contributions have won comparable recognition. To argue that all original research is, by definition, "outstanding" is to weaken that adjective beyond any useful meaning, and to presume that most research is "unoriginal."

As stated above, outstanding researchers should stand apart in the academic community through eminence and distinction based on international recognition. The regulation at issue provides criteria to be used in evaluating whether a professor or researcher is deemed outstanding. 56 Fed. Reg. 30703, 30705 (July 5, 1991). Any Ph.D. thesis, postdoctoral or other research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. To conclude that every researcher who performs original research that adds to the general pool of knowledge meets this criterion would render this criterion meaningless.

Furthermore, the regulations include a separate criterion for scholarly articles. 8 C.F.R. § 204.5(i)(3)(i)(F). Thus, the mere authorship of scholarly articles cannot serve as presumptive evidence to meet this criterion. To hold otherwise would render the regulatory requirement that a beneficiary meet at least two criteria meaningless.

In a similar vein, the evidence that the beneficiary holds patents for his inventions establishes that he is an inventor, but the very existence of the patents does not show that the beneficiary's inventions are

more significant than those of others in his field. To establish the significance of the beneficiary's work, we turn to experts in his field, whose letters we discuss below.

The opinions of experts in the field, however, while not without weight, cannot form the cornerstone of a successful claim of international recognition. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of widespread recognition and vague claims of contributions are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are the most persuasive. Ultimately, evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An individual with international recognition should be able to produce unsolicited materials reflecting that recognition.

_____ the petitioner's Vice President of Technology Development and Business Intelligence, asserts that the beneficiary led the petitioner's study of rodent exposure to inhaled nanoparticles. According to _____ the beneficiary developed and repeatedly demonstrated for the first time an experimental system for nanoparticle, resulting in a patent listing the beneficiary as the lead inventor. _____ asserts that the beneficiary is also a listed inventor on four other research disclosures. _____ does not suggest that the beneficiary's patented innovation has been licensed, successfully marketed, or otherwise widely utilized in the field.

_____, an academy research fellow at Helsinki University of Finland, explains that he became familiar with the beneficiary's research through his publications. _____ also asserts that the beneficiary "designed and built a test platform, which was used for the first in-vivo inhalation study of nano-fullerenes." Once again, _____ does not express any interest in licensing or otherwise utilizing this test platform himself and does not identify any independent laboratory pursuing studies with the beneficiary's platform.

_____ an associate professor at the University of Alberta, who met the beneficiary at an international conference and has served on a professional committee with the beneficiary, discusses the importance of nanotechnology in general. _____ asserts that the beneficiary's presentation on the release of carbon nanoparticles during the sanding of a nanocomposite was well received but

does not explain how it has impacted the field. Rather, [REDACTED] speculates that this data “will play a significant role in the development of American, as well as international occupational safety and health guidelines.”

[REDACTED] discusses the beneficiary’s 2007 article on C60 nanoparticles as especially significant. [REDACTED] explains that inhalation is considered the prime route of exposure to nanoparticles but that it was extremely challenging to generate nanoparticle aerosols with repeatable quality for inhalation toxicology exposures. [REDACTED] asserts that the beneficiary used a unique design to generate nanoparticles in 10 to 15 times higher concentrations than previously reported. [REDACTED] does not explain how this work has impacted the field. [REDACTED] does not claim to be pursuing any research based on the beneficiary’s design.

Finally, [REDACTED] notes the beneficiary’s 2008 article discussing deficiencies in data and technology in evaluating the biological responses to engineered nanoparticles. [REDACTED] concludes that the beneficiary will take a lead role in developing the technology and engineering systems to generate and monitor nanoparticles.

[REDACTED] of the Exposure Sciences Program at the University of Washington, asserts that he met the beneficiary when they both worked at the Washington Technology Center assisting Boeing with measuring nanoparticle constituents. As noted by [REDACTED] he and the beneficiary coauthored a 2006 article, presented at a NIOSH conference, which [REDACTED] asserts was well received. [REDACTED] asserts that the beneficiary’s data is of great interest in scientific and government circles but does not affirm that policy makers have relied on the beneficiary’s data. [REDACTED] also praises other presentations by the beneficiary but does not explain how this work has already impacted the field.

[REDACTED] team leader of the aerosol sciences team of the U.S. Army Edgewood Chemical Biological Center, asserts that he met the beneficiary at a conference. [REDACTED] discusses the importance of nanotechnology and asserts that the beneficiary’s research on the controlled synthesis and characterization of nanoparticles is a very important step towards the development of novel nanomaterials for various applications. Specifically, [REDACTED] asserts that the beneficiary has made a “significant breakthrough in the field of mass production of nanoparticle aerosol.” While [REDACTED] asserts that the system was designed for inhaled toxicology studies, it could be used in other industries with minor modifications. [REDACTED] does not, however, assert that the U.S. Army is pursuing any uses of the beneficiary’s system or that any independent laboratory is doing so. While [REDACTED] further concludes that the beneficiary’s work “can play a critical role in defining the standards and policies for monitoring and managing the hazards of nanomaterials,” he provides no examples of any standards or policies based on the beneficiary’s work either in final or draft form.

[REDACTED] an analytical chemist with Boeing Commercial Airplanes, asserts that she met the beneficiary through the Washington Technology Center (WTC) when Boeing and WTC “shortlisted”

the beneficiary as a prime expert to measure and qualify environmental standards for nanoparticle constituents. [REDACTED] asserts that the beneficiary's team is taking a leading role on this question, noting that the beneficiary presented his work at a conference with federal and state agency officials present. While [REDACTED] concludes that the beneficiary's work will enable government agencies to manage the risk of nanoproducts, she provides no examples of government agencies using the beneficiary's work to develop guidelines.

In response to the director's request for additional evidence, [REDACTED] of [REDACTED] asserts that the beneficiary's invention is being used by the National Toxicology Program of the National Institute of Environmental and Health Sciences (NIEHS) to conduct in-vivo inhalation toxicology exposures to nanomaterials among rodents. While we do not question [REDACTED] [REDACTED]'s credibility, [REDACTED] does not claim to have first hand knowledge of this usage and the record contains no letters from any official at NIEHS confirming their use of the beneficiary's invention.

The petitioner documented the beneficiary's publications and presentations and citations of his work. In addition to providing the citations themselves, the petitioner provided letters from some of the authors who have cited the beneficiary's work. These authors, however, primarily speculate as to the future impact of the beneficiary's work. For example, [REDACTED], a group leader at Empa Swiss Federal Laboratories, asserts broadly that the beneficiary's work "can have far-reaching consequences in the arena of nanotoxicology" and "promises to be the crux of all future scientific research in the world." [REDACTED], Scientific Director for the safety division of L'Oreal, asserts that the beneficiary and his colleagues "will help the scientific community in better understanding of adverse effects of particles on the skin or other tissues and the dependence of effects on particle size." [REDACTED], a professor in the Laboratory for Atomic Physics at the Vinca Institute of Nuclear Sciences, Belgrade, asserts that the beneficiary's work "will greatly benefit the international research community and help reduce the deficiency of data and limitations of technology in understanding the biological responses to the engineered nano particles." The actual level of citation as of the date of filing, the date as of which the petitioner must establish the beneficiary's eligibility, is not indicative of international recognition as outstanding.

[REDACTED], who cited the beneficiary's work in a review article, asserts that his group has used the beneficiary's results as a reference for their own work. In his actual article, [REDACTED] simply cites the beneficiary's article as one of six studies showing no toxicity. [REDACTED], an assistant professor at the University of Massachusetts similarly asserts that he has found the beneficiary's work useful to his own research. That the beneficiary's work has recently had practical applications does not demonstrate its notable impact as of the date of filing.

While the beneficiary's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. The record does not establish that the beneficiary's work has been recognized internationally as outstanding.

Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

As stated above, the petitioner submitted evidence of the beneficiary's presentations, publications and citations of his work. The director concluded that publications alone cannot establish the significance of the beneficiary's contributions but did not explicitly address this criterion. On appeal, counsel notes that the beneficiary has been cited and references an unpublished AAO decision that purportedly approved a petition in this classification based on publications and citations. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The Department of Labor's Occupational Outlook Handbook, 2008-2009 (accessed at www.bls.gov/oco on December 3, 2009 and incorporated into the record of proceedings), provides information about the nature of employment as a postsecondary teacher (professor) and the requirements for such a position. See www.bls.gov/oco/ocos066.htm. The handbook expressly states that faculty members are pressured to perform research and publish their work and that the professor's research record is a consideration for tenure. This information reveals that original published research, whether arising from research at a university or private employer, does not set the researcher apart from faculty in that researcher's field.

The record in this matter does contain citations and letters from some of the researchers who have cited the beneficiary's work. We are satisfied that the beneficiary meets this one criterion. For the reasons discussed below, however, the petitioner has not established that the beneficiary meets the necessary second criterion.

The petitioner has shown that the beneficiary is a talented and prolific researcher, who has won the respect of his collaborators, employers, and mentors, while securing some degree of international exposure for his work. The record, however, stops short of elevating the beneficiary to the level of an alien who is internationally recognized as an outstanding researcher or professor. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

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 sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.