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U.S. Citizenship
and Immigration
Services

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B6



File:

WAC-05-158-50930

Office: CALIFORNIA SERVICE CENTER Date **JUN 27 2008**

In re:

Petitioner:

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:



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.

A handwritten signature in black ink, appearing to read "Rob Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center (“Director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a private household and seeks to employ the beneficiary permanently in the United States as a housekeeper, home (“Housemanager”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s January 23, 2006 denial, the petition was denied based on the petitioner’s failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

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).¹

The record shows that the appeal is properly filed, 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 petitioner has filed to obtain an immigrant visa and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

The regulation 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

¹ 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. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on November 18, 1997. The proffered wage as stated on Form ETA 750 for the position of a controller is \$12.02 per hour, which is equivalent to \$25,001.60 per year based on a forty-hour work week. The labor certification was approved on January 16, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on May 12, 2005. The petitioner did not list any of the following information on the I-140 Petition: date established; gross annual income; net annual income; and number of employees.

On August 19, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional information related to the petitioner's ability to pay, including the petitioner's federal tax returns, annual reports, or audited financial statement for the years 1998 to the present. Further, the RFE requested that the petitioner provide evidence of any wages that the petitioner paid the beneficiary, or to provide the beneficiary's Forms W-2 Wage and Tax Statements if the petitioner's tax returns did not establish its ability to pay.

Counsel responded to the RFE. On October 13, 2005, the director issued a Notice of Intent to Deny ("NOID"). The NOID provided the petitioner an additional 30 days to provide evidence that the petitioner had the ability to pay the proffered wage, as the response received to the RFE did not demonstrate the petitioner's ability to pay from the priority date onward. The petitioner responded and provided evidence of pay and employment from a different employer.

On January 23, 2006, the director denied the petition finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed that decision.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the beneficiary, the beneficiary did not list any employment with the petitioner. Counsel provided the following evidence of wage payment:

<u>Year</u>	<u>Employer</u>	<u>Form 1099 pay</u>
2004	[REDACTED]	\$13,960
2003	[REDACTED]	\$8,120

Counsel also provided copies of three paystubs issued by [REDACTED] to the beneficiary, dated August 26, 2005, September 2, 2005, and September 9, 2005, showing wages in the amount of \$10 an hour, and a hire date of November 11, 2004. In response to the NOID, counsel provided four more paystubs issued by [REDACTED], dated October 9, 2005, October 23, 2005, October 30, 2005, and November 6, 2005, which exhibited pay in the amount of \$12.50 per hour. Counsel additionally submitted a letter from the Vice President of [REDACTED], dated November 10, 2005, which stated that, "Please be advised that [the beneficiary] is currently employed by me as House Manager . . . The payroll is processed through our corporation which is owned by me and my husband."

We will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203717 *3 (D.Mass. Sept. 18, 2003). Further, a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. As [REDACTED] is not the petitioning entity on Form I-140, or the applicant on Form ETA 750, wages paid by [REDACTED] cannot be used to show the petitioner's ability to pay the proffered wage. Therefore, the petitioner may not establish its ability to pay the proffered wage through prior wage payment.

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, Citizenship & Immigration Services ("CIS") will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 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).

The petitioner appears to be a sole proprietor,² a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

To demonstrate the sole proprietor's ability to pay, the sole proprietor would need to establish that it could pay the proffered wage, as well as support his family based on information from the individual's federal tax return, Form 1040.

The petitioner submitted a statement regarding its tax returns:

I hereby certify that my wife . . . and I have sufficient income to pay the wages offered to [the beneficiary].

² The petitioner did not submit any tax returns, but would appear to be a sole proprietorship as the petitioner listed on Form ETA 750 is a "private household."

Due to concerns for the privacy of our personal financial records and tax returns, I hereby authorize the Department of Homeland Security, Citizenship and Immigration Services to obtain any information needed to verify our income from the Internal Revenue Service.

The letter contained the sole proprietor's name and address, but no social security number. Further Form I-140 did not contain the sole proprietor's social security number. Counsel provided a copy of the same letter in response to the director's RFE.

8 C.F.R. § 204.5(g)(2) provides that "the petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added). The burden is on the petitioner to provide such evidence, not for the government to request records from another agency to establish the petitioner's ability to pay.

The petitioner provided no tax returns, no wage statements, or Forms W-2 on behalf of the beneficiary³ to show any prior payments from the priority date to the present. Further, the sole proprietor did not provide a list of regular household expenses to demonstrate that it could pay the wages, and support the sole proprietor's household. As the petitioner did not provide the initial required evidence mandated under 8 C.F.R. 204.5 § (g)(2), the petition was denied.

On appeal, counsel references the memo from William R. Yates, Associate Director for Operations at Citizenship and Immigration Services (CIS), *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*, HQPRD 70/6.2.8-P (May 12, 2005) (hereinafter "2005 memorandum") and asserts that since evidence of other employment was provided, the beneficiary should be eligible to "port" under AC 21 to the new petitioner.

Counsel cites the Yates Memo, which in pertinent part, provides for the following:

Question 1. How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under § 106(c) of AC21?

Answer: If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:

³ The beneficiary's Form G-325 lists that she was employed with the petitioner from June 1993 to December 2002.

Counsel additionally provides on appeal that the petitioner is not required to employ the beneficiary until the beneficiary obtains permanent residence.

While counsel's statement is correct, we note that Form G-325A provides that the petitioner previously employed the beneficiary, but did not provide any evidence of wage payment for the time period in question of 1997 through 2002 to show the petitioner's ability to pay the proffered wage.

- A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated within 180 days.

....

- B. If additional evidence is necessary to resolve a material post-filing issue such as ability to pay, an RFE can be sent to try to resolve the issue. When a response is received, and if the petition is approvable, follow the procedures in part A above.

(Emphasis in original).

Nothing in the Yates Memo should be read to obviate the petitioner's requirement under 8 C.F.R. § 204.5(g)(2) that it needs to demonstrate its ability to pay from the priority date onward. The Form ETA 750 was filed in November 1997. The petitioner provided no documentation of its ability to pay in 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, or 2005. The petitioner cannot circumvent its ability to pay through "porting" to a new employer. AC 21 does not negate the requirement that the petitioner must demonstrate its ability to pay.

As the initial petition was denied, the beneficiary would seek portability based on an unapproved I-140 petition. No related statute or regulation would render the beneficiary portable under these facts.

The pertinent section of AC 21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Section 204(a)(1)(F) of the Act includes the immigrant classification for individuals holding baccalaureate degrees who are members of the professions and skilled workers under section 203(b)(3) of the Act, the classification sought in the [underlying (if a 485 certification)] petition.

An immigrant visa is immediately available to an alien seeking employment-based preference classification under section 203(b) of the Act (such as the beneficiary in this case) when the alien's visa petition has been

approved and his or her priority date is current. 8 C.F.R. § 245.1(g)(1), (2). Hence, adjustment of status may only be granted “by virtue of a valid visa petition approved in [the alien’s] behalf.” 8 C.F.R. § 245.1(g)(2).

After enactment of the portability provisions of AC21, on July 31, 2002, CIS published an interim rule allowing for the concurrent filing of Form I-140 and Form I-485, whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time without the need to wait for an approved I-140. *See* 8 C.F.R. § 245.2(a)(2)(B)(2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). The beneficiary in the instant matter had filed his Form I-485 on July 13, 2006, concurrently with the petitioner’s filing of Form I-140.

CIS implemented concurrent filing as a convenience for aliens and their U.S. employers. Because section 204(j) of the Act applies only in adjustment proceedings, CIS never suggested that concurrent filing would make the portability provision relevant to the adjudication of the underlying visa petition. Rather, the statute and regulations prescribe that aliens seeking employment-based preference classification must have an immigrant visa petition approved on their behalf before they are even eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

Section 204(j) of the Act prescribes that “A petition . . . shall remain valid with respect to a new job if the individual changes jobs or employers.” The term “valid” is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260, 2000 WL 622763 (Apr. 11, 2000); *see also* H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term “valid,” as used in section 204(j) of the Act, refers to an approved visa petition.

Statutory interpretation begins with the language of the statute itself. *Hughey v. U.S.*, 495 U.S. 411, 415 (1990). We are expected to give the words used in the statute their ordinary meaning. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citing *I.N.S. v. Phinpathya*, 464 U.S. 183, 189 (1984)). We must also construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988). *See also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561, 573 (1989); *Matter of W-F-*, 21 I&N Dec. 503, 506 (BIA 1996).

With regard to the overall design of the nation’s immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs CIS’s authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).⁴

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien “entitled” to immigrant classification under the Act “may file” a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that CIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted CIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until CIS approves the petition.

Therefore, to be considered “valid” in harmony with the portability provision of section 204(j) of the Act and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by CIS pursuant to the agency’s authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with CIS or through the passage of 180 days.

Section 204(j) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

Accordingly, it would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant classification. We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.⁵

⁴ We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word “pending.” *See* Section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

⁵ Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge’s jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien’s application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when “an approved immigration petition will remain valid for the purpose of an application of adjustment of status.” *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a “previously approved I-140 Petition for Alien Worker”); *Perez-Vargas*, 478 F.3d at 193 (stating that “[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved”). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.

In the case at hand, the Form I-140 petition was denied. The petitioner failed to provide any evidence on appeal to overcome the basis for denial related to the initial petitioner. The beneficiary would therefore not have a valid immigrant visa petition approved on her behalf to be eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

The enactment of the portability provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require CIS to approve an immigrant visa petition prior to granting adjustment of status. Accordingly, as this petition was denied, it cannot be deemed valid by improper invocation of section 204(j) of the Act.

Further, counsel did not provide any evidence that the new employer, [REDACTED] would qualify as the successor-in-interest to the initial petitioner in order to validly continue processing under the initial labor certification. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Accordingly, the petitioner has failed to demonstrate that the beneficiary can validly continue to utilize the labor certification initially filed the initial Form ETA 750 applicant.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the record does not demonstrate that the beneficiary meets the position's experience requirements certified on the Form ETA 750. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.