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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: SRC 07 048 52914 Office: TEXAS SERVICE CENTER Date: APR 06 2009

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Other Worker Pursuant to § 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.

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).

John F. Grissom
Acting 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 petitioner is an elder and childcare placement service. It seeks to employ the beneficiary permanently in the United States as a nurse's aide. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original May 18, 2007, decision, 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)(iii) of the Immigration and Nationality Act (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.

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 either be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

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 Department of Labor. See 8 CFR § 204.5(d). The priority date in the

instant petition is November 20, 2002. The proffered wage as stated on the Form ETA 750 is \$15 per hour or \$31,200 annually.

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.¹

Relevant evidence submitted on appeal includes counsel's brief, a copy of the 2004 Form 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, copies of the petitioner's 2003 through 2005 Forms 1120, U.S. Corporation Income Tax Returns, and copies of the petitioner's 2003 bank statements through October 31, 2003. Other relevant evidence includes a letter, dated June 13, 2005, from [REDACTED] a copy of the petitioner's 2002 Form 1120-A, U.S. Corporation Short-Form Income Tax Return; copies of payroll records and payroll checks, issued by the petitioner on behalf of the beneficiary for the pay-dates of March 24, 2006, April 3, 2006, November 4, 2006, November 10, 2006, November 20, 2006, April 13, 2007, and April 22, 2007; copies of the 2002, 2005, and 2006 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary; a copy of a 2004 Wage and Tax Summary, issued by the petitioner on behalf of the beneficiary; copies of the 2003 and 2006 Forms W-2, Wage and Tax Statement, issued by the petitioner on behalf of the beneficiary; copies of the petitioner's bank statements for December 28, 2001, January 28, 2002, November 16, 2002, November 29, 2002, and December 31, 2002; and a copy of the petitioner's owner's line of credit with Bank of America in 2002 and 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.²

The petitioner's 2002 through 2005 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of -\$60,384, -\$33,588, -\$28,880, and \$2,547,

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).

² The AAO notes that the record of proceeding contains several different addresses for the petitioner. The petitioner's 2002 through 2004 tax returns and the 2004 Wage and Tax Summary reflect an address of [REDACTED]. The petitioner's 2005 tax return, the 2004, 2005, and 2006 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, and the 2006 Form W-2, issued by the petitioner on behalf of the beneficiary, reflect an address of [REDACTED]. The 2002 Form 1099-MISC and the 2003 Form W-2, issued by the petitioner on behalf of the beneficiary, reflect an address of [REDACTED]. The petitioner does not offer an explanation as to why its address would be different, especially within the same year (i.e., 2004).

respectively. The petitioner's 2002 through 2005 Forms 1120 also reflect net current assets of \$0, \$0, \$0, and \$509, respectively.

The 2002, 2004, 2005, and 2006 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary reflect wages paid to the beneficiary of \$23,272, \$2,270, \$7,660, and \$20,008.43, respectively.

The 2003 and 2006 Forms W-2, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary of \$33,420 and \$6,180, respectively.

The 2004 Wage and Tax Summary reflects wages paid to the beneficiary of \$14,137.50 in 2004.

The payroll records and payroll checks, issued by the petitioner on behalf of the beneficiary for the pay-dates of March 24, 2006, April 3, 2006, November 4, 2006, November 10, 2006, November 20, 2006, April 13, 2007, and April 22, 2007 reflect wages paid to the beneficiary of \$600, \$600, \$600, \$1,020, \$1,120, \$624, and \$624, respectively.

The letter from Bank of America states that the owner had an active line of credit in 2002 and 2003, but does not state the amount.

The petitioner's bank statements reflect balances ranging from a low of -\$208.76 on October 31, 2003 to a high of \$12,812.35 on January 31, 2003.

The letter, dated June 13, 2005, from the petitioner's CPA states:

The purpose of this letter is to support a Form I-140 immigrant visa petition filed by [the petitioner] on behalf of [the beneficiary]. Please note that the depreciation expense is an accounting term of art used to allocate previously spent funds to expense. The depreciation is considered a "non-cash" expense and therefore, the amount of this expense is actually available to help pay the wage of [the beneficiary]. The amount of depreciation expense in the year 2002 was \$7,153.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$31,200 based on the petitioner's depreciation, the wages paid to the beneficiary, its bank account statements, and the totality of the circumstances. Counsel further claims that "the petitioner need not show the ability to pay the full amount of the wage in all intervening years, since it is a prospective job offer and the employer has demonstrated its current ability to pay." Counsel cites a non-precedent decision and a Board of Alien Labor Certification Appeals (BALCA) decision in support of her contentions.

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, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the instant case, the petitioner would need to show that it is a successor in interest to the original business, which filed the labor certification. The petitioner must show that it has assumed all the rights, duties, and obligations of that business. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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 750, signed by the beneficiary on March 25, 2004, the beneficiary claims to have been employed by the petitioner from February 2002 to the present (March 25, 2004). In addition, counsel has submitted Forms W-2, Forms 1099-MISC, payroll records, and paychecks for 2002 through April 2007, issued by the petitioner on behalf of the beneficiary that support the beneficiary's claims. Therefore, the petitioner has established that it employed the beneficiary in 2002 through April 2007.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$31,200 and the actual wages paid to the beneficiary in the pertinent years (2002 through 2007). In 2002, the petitioner paid the beneficiary \$7,928 less than the proffered wage; in 2003, the petitioner paid the beneficiary \$2,220 more than the proffered wage; in 2004, the petitioner paid the beneficiary \$14,792.50 less than the proffered wage; in 2005, the petitioner paid the beneficiary \$23,540 less than the proffered wage; and in 2006, the petitioner paid the beneficiary \$5,011.57 less than the proffered wage of \$31,200. Because the petitioner compensated the beneficiary more than the proffered wage of \$31,200 in 2003, the petitioner has established its ability to pay the wage in 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that USCIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense

charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

In 2002 through 2005, the petitioner was organized as a "C" corporation. For a "C" corporation, USCIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A. The petitioner's tax returns demonstrate that its net incomes in 2002 through 2005 were -\$60,384, -\$33,588, -\$28,880, and \$2,547, respectively. The petitioner could not have paid the differences of \$7,928 in 2002, \$14,792.50 in 2004, or \$23,540 in 2005 between the proffered wage of \$31,200 and the actual wages paid to the beneficiary of \$23,272 in 2002, \$16,407.50 in 2004, and \$7,660 in 2005 from its net incomes in those years. In addition, the petitioner has not submitted its 2006 tax return (which should have been available when counsel filed the appeal on June 14, 2007), and therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$5,011.57 between the proffered wage of \$31,200 and the actual wages paid to the beneficiary of \$26,188.43 in 2006 from its net incomes in 2006.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that 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, USCIS 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, USCIS 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end

³ 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,

current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2002 through 2005 were \$0, \$0, \$0, and \$509, respectively. The petitioner could not have paid the differences of \$7,928 in 2002, \$14,792.50 in 2004, or \$23,540 in 2005 between the proffered wage of \$31,200 and the actual wages paid to the beneficiary of \$23,272 in 2002, \$16,407.50 in 2004, and \$7,660 in 2005 from its net current assets in those years. In addition, the petitioner has not submitted its 2006 tax return, and therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$5,011.57 between the proffered wage of \$31,200 and the actual wages paid to the beneficiary of \$26,188.43 in 2006 from its net current assets in 2006.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$31,200 based on the petitioner's depreciation, the wages paid to the beneficiary, its bank account statements, and the totality of the circumstances. Counsel further claims that "the petitioner need not show the ability to pay the full amount of the wage in all intervening years, since it is a prospective job offer and the employer has demonstrated its current ability to pay." Counsel cites a non-precedent decision and a Board of Alien Labor Certification Appeals (BALCA) decision in support of her contentions.

Counsel is mistaken. 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate its continued ability to pay the proffered wage from the time of the priority date onward. Additionally, counsel's and the CPA's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated.

inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel's claim that the petitioner has established its ability to pay the proffered wage based on the wages paid to the beneficiary is also not completely correct. While USCIS will consider the wages paid to a beneficiary in a given year, the petitioner is obligated to show that it has sufficient funds to pay the entire wage to the beneficiary in each year beginning at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence, not just a portion of the proffered wage. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has not done so in the instant case. In addition, although the petitioner submitted payroll records and paychecks for the beneficiary in 2006 and 2007 that show that the beneficiary would have earned the proffered wage in 2006 or slightly more than the proffered wage in 2007 had the petitioner employed the beneficiary the entire year, the beneficiary's 2006 Form W-2 and Form 1099-MISC does not show that the beneficiary earned the proffered wage in 2006. Furthermore, the two payroll records for 2007 does not establish that the beneficiary was employed for the entire year in 2007 or that the petitioner continued to pay the beneficiary at a rate more than the proffered wage of \$31,200 in 2007.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

On appeal, counsel cites *Maysa, Inc.*, 98 INA 259 (BALCA May 21, 1999) claiming that an "employer's failure to pay the prevailing wage determined for labor certification purposes while the alien was in H-1B status was not a basis for denial of the labor certification, since the labor certification is a prospective commitment to pay the prevailing wage." However, counsel does not state how the Department of Labor's (DOL) BALCA precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS 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, USCIS does not require that the petitioner pay the proffered wage until the beneficiary obtains her lawful permanent residence; however, the petitioner is obligated to show that it has sufficient funds to pay the entire proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Again, *see* 8 C.F.R. § 204.5(g)(2).

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an

immigrant visa petition, which had been filed by a small “custom dress and boutique shop” on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary’s annual wage of \$6,240 was considerably in excess of the employer’s net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner’s simple net profit, including news articles, financial data, the petitioner’s reputation and clientele, the number of employees, future business plans, and explanations of the petitioner’s temporary financial difficulties. Despite the petitioner’s obviously inadequate net income, the Regional Commissioner looked beyond the petitioner’s uncharacteristic business loss and found that the petitioner’s expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner’s circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, USCIS may, at its discretion, consider evidence relevant to a petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. USCIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems to be relevant to the petitioner’s ability to pay the proffered wage. In this case, the petitioner’s tax returns indicate it was incorporated in 2001. The petitioner has provided its tax returns for 2002 through 2005, with none of the tax returns establishing the petitioner’s ability to pay the proffered wage of \$31,200 (the petitioner has established its ability to pay the proffered wage in 2003 by actually paying more than the proffered wage in that year.). In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner’s reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. Additionally, in reviewing the petitioner’s tax returns, its gross receipts have declined in each year since 2003. The petitioner’s business shows decline rather than growth. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

For the reasons discussed above, the assertions of counsel on appeal do not overcome the decision of the director.

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.