



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date:
DEC 01 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

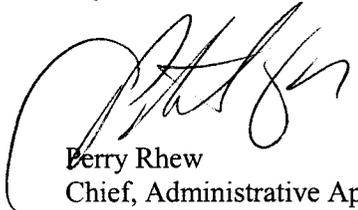
ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is healthcare service provider. It seeks to employ the beneficiary permanently in the United States as a professional nurse, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (DOL) has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the [redacted] The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [U.S. Citizenship and Immigration Services]." 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d).

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

Also, according to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must have: (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment; or (3) show that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

As set forth in the director's September 11, 2007 denial, 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.

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 date that the I-140 was filed, which in this case was October 30, 2006. The proffered wage stated on the Prevailing Wage Determination ("PWD") issued by the New York State Department of Labor is \$25.43 per hour (\$52,894 per year).

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in March 2005. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 9089, signed by the beneficiary on October 27, 2006, the beneficiary did not claim to have worked for the petitioner.

² 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. In Schedule A cases, the filing of an I-140 establishes a priority date for the immigrant petition; 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 Sonogawa*, 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. In the instant case, the petitioner submitted a letter which stated that it began employing the beneficiary in January 2007. The paystubs provided cover the period of March 19, 2007 to September 21, 2007 and demonstrate that the petitioner paid the beneficiary \$15,087.50 during that time period.³ This amount is less than the proffered wage and is thus insufficient to establish the petitioner's ability to pay the proffered wage in 2007. Additionally, as the priority date is in 2006, the petitioner must establish its ability to pay in 2006.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

³ The paystubs reflect that the petitioner paid the beneficiary different amounts. Several checks list an hourly rate of \$12 per hour, while other checks list \$28 per hour. Additionally, several checks reflect that the petitioner employed the beneficiary for less than 40 hours per week. *See* 20 C.F.R. § 656.3 ("Employment means permanent full-time work by an employee for an employer other than oneself."). The position must entail full-time employment.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 116. "[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." *Chi-Feng Chang*, 719 F.Supp. at 537 (emphasis added). As a result, we will not take into account the amounts that the petitioner used in valuing its depreciation amount. Similarly, we will not look at the total assets in isolation as the petitioner urges us to do.

The record before the director closed on July 3, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due, so the 2006 return was the most recent return available. The petitioner's 2006 Form 1120S stated net income⁴ of \$2,699. This amount is

⁴ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. See Instructions for Form 1120S, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 26, 2009) (indicating that Schedule K is a summary schedule of all

less than the proffered wage so the petitioner cannot demonstrate sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's 2006 Form 1120S demonstrates its end-of-year net current assets as -\$14,367. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in 2006.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date of October 27, 2006 through actual wages paid to the beneficiary in 2007 or its net income or net current assets found on its 2006 tax returns. We also note that the petitioner has filed other Immigrant Petitions for Alien Worker (Form I-140) for ten more workers around the same time that the petition for the beneficiary was filed. Therefore, the petitioner must show that it had sufficient income to pay all the respective wages from each respective priority date onward. Counsel does not specifically address the other nine filings raised in the director's decision.

The petitioner submitted its quarterly federal tax return, Form 941 for the second quarter of 2007. While the Form statements show a consistent history of wage payments, the statements do not establish the petitioner's ability to pay the proffered wage. Wages paid to others generally will not demonstrate the petitioner's ability to pay for the instant beneficiary. The Form 941 does not list payments to any specific individuals, and does not specifically list any wages paid to the beneficiary.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Specifically, counsel asserts that the AAO should consider the petitioner's projected profits and should examine the statement from the petitioner's accountant stating that the petitioner has the ability to meet its current payroll obligations.

shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K, the petitioner's net income is found on Schedule K of its tax return.

⁵According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the I-140 petition was filed with USCIS.

The accountant's statement, dated October 3, 2007 asserts "I have concluded that [the petitioner] has the financial ability to pay a salary of \$52,000 per year." (emphasis added). The accountant states that the petitioner could meet the proffered salary amount by noting that the cash on hand reflected on Schedule L of the Form 1120S is an amount available after "all of the company expenses were paid off . . . and after Officers' Compensation and Dividend Distributions were taken." The cash balance was previously considered in our discussion of the petitioner's net current assets. The petitioner's total assets must be balanced by the petitioner's liabilities to give a complete picture of the petitioner's financial situation. Even if the AAO were to consider the accountant's calculations as a means of determining the petitioner's ability to pay the proffered wage, the petitioner's cash balance of \$12,186 added to the officer compensation of \$66,000 would not be sufficient to demonstrate the ability to pay the proffered wage of the beneficiary and the other ten sponsored workers for which the petitioner filed petitions. The accountant's statement that the AAO should also add in the other company expenses that were paid does not impact the petitioner's ability to pay the proffered wage. Those funds have been allocated to other financial obligations and would not be available to pay the proffered wage. The question is not whether the petitioner can allocate funds to the beneficiary, but instead whether the petitioner has the ability to pay the proffered wages in light of its other financial obligations. Reallocating funds from a debt owed by the petitioner does not demonstrate its ability to pay the proffered wage.

The petitioner also submitted bank statements covering the period June 1, 2007 to August 31, 2007. 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. In addition, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. The statements submitted do not cover the entire time period from the priority date. Lastly, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that would not be reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L, which would be considered in determining the petitioner's net current assets.

Along with the bank statements, the petitioner provided evidence of a line of credit available to it. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at

the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel also states that the petitioner's revenue increases with each additional person hired so that the beneficiary's employment would generate sufficient revenue to pay the proffered wage. Such an argument is based on speculation. The Commissioner in *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) stated:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

See also *Matter of Katigbak*, 14 I&N Dec. at 49 (the petitioner must establish eligibility at the time of the priority date and cannot establish eligibility in the future under a new set of facts). Therefore, we will not consider whether or if the beneficiary's employment will increase the petitioner's net income.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in

California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the 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 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 relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner did not demonstrate some sort of off year. The petitioner did not show that its tax return does not paint an accurate financial picture of its ability to pay the proffered wage. Counsel points to contracts entered for the petitioner's services and invoices for services provided as proof of the petitioner's ability to pay the proffered wage. However, the contracts were signed in 2004, so the income generated would be reflected on the petitioner's earlier tax returns. Counsel provides no additional evidence to show that these contracts somehow represent income not previously considered or that would be available in 2006 or 2007. Similarly, the invoices for services provided in 2007 show only that the petitioner continued to operate its business: no evidence was provided to show how these invoices reflected income outside of what would be reported on tax returns or otherwise represented some sort of great rise in the petitioner's overall income resources. As the petitioner only provided a Form 1120S for 2006 and one quarterly tax return for 2007, we are unable to determine the petitioner's overall growth rate or what constitutes a "normal" or "off" year for the business. In addition, the petitioner presented no evidence regarding its reputation or standing in the community. 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date or that it could pay all of the sponsored workers from each respective priority date

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

- (3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

The Notice of Job Opportunity provided by the petitioner states that any person with “documentary evidence bearing on the Application” should provide it to the [REDACTED] and lists the address for that organization. As the posting was dated August 28, 2006 to September 14, 2006, the petitioner would need to list the appropriate certifying officer under the PERM regulations, effective March 28, 2005. The correct certifying officer address for a job offer in New York, however, is the [REDACTED]

As such, the petitioner failed to comply with the notice requirements in 20 C.F.R. § 656.10(d)(ii) and the petition is not approvable.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁶ See FAQ Round 1 at http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf (accessed October 9, 2009).