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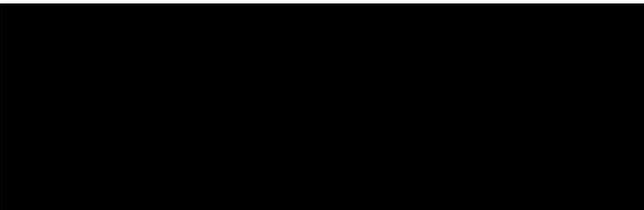
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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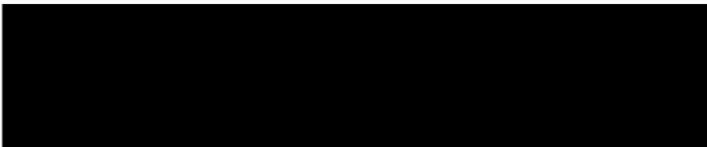
Office: TEXAS SERVICE CENTER Date:

JAN 12 2010

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:



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 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 engages in the renovation of historic buildings. It seeks to employ the beneficiary permanently in the United States as a historic building renovator. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 and denied the petition accordingly.

On appeal, the petitioner, through current counsel, submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage and that the petition should be approved.

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).

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

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for

processing on April 9, 2001.¹ The proffered wage is stated as \$27.00 per hour, which amounts to \$56,160 per year. Part B of the Form ETA 750 was signed by the beneficiary on October 17, 2005. There is no indication that the petitioner has employed the beneficiary as of the date of signing.

The Immigrant Petition for Alien Worker, (Form I-140) was filed on March 6, 2007. Part 5 of the petition indicates that the petitioner was established on July 1, 2003 and claims a gross annual income of \$689,675 and a net annual income of \$246,110.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The tax returns contained in the record indicate that the petitioner was initially structured as a sole proprietorship, but was incorporated on July 1, 2003.² A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). In support of its continuing financial ability to pay the proffered wage of \$56,160 per year as of the April 9, 2001, priority date, the petitioner provided copies of its sole proprietor's U.S. Individual Income Tax Return for 2001, 2002, and

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

² Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

2003. They reflect that the sole proprietor filed jointly with his spouse and claimed two dependents in each of the three years. The returns also contain the following information:

	2001	2002	2003
Wages	\$ 546	\$3,906	\$52,159
Taxable interest	\$ n/a	\$ 6	\$ n/a
Business Income	\$93,744	\$52,061	\$38,434
Capital gain or (loss)	\$ 246	\$ n/a	\$ n/a
Adjusted Gross Income ³	\$88,301	\$46,508	\$87,877

Although requested by the director in his request for evidence issued on August 14, 2007, the petitioner, failed to provide a summary of household expenses for 2001, 2002 and the first six months of 2003. The petitioner also failed to supply the number of workers that the petitioner employs, which was left blank on the preference petition. Along with copies of the sole proprietor's individual tax returns, a copy of a 2006 Wage and Tax Statement issued by the corporate petitioner to an individual other than the beneficiary was additionally submitted. An unsigned transmittal letter from former counsel suggests that this individual is currently employed in the position that the beneficiary will assume. No other details are provided. Such an unsigned, undocumented statement is not probative of such a theory and will not be further considered. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner also provided copies of its corporate tax returns for 2003, 2004, 2005 and 2006. The 2003 return was filed as a Form 1120, U.S. Corporation Income Tax Return.⁴ The remaining returns reflect that the corporate petitioner uses a standard calendar year as its fiscal year. Although the dates are not indicated, because the petitioner was not incorporated until July 1, 2003, it is assumed that the 2003 return covers from July 1st until December 31st of that year. The returns contain the following information:

³ Adjusted gross income is shown on line 33 of the Form 1040 in 2001; line 35 in 2002 and line 34 in 2003.

⁴ Form 1120 reflects a tax return filed by a C corporation. On this form, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

Year	2003	2004	2005	2006
Net Income ⁵	-\$20,930	-\$ 2,002	\$ 7,899	\$ 18,426
Current Assets	\$ 5,897	\$ 31,331	\$ 7,270	\$ 72,052
Current Liabilities	\$40,650	\$ 2,911	\$ 9,063	\$107,212
Net Current Assets	-\$34,753	\$ 28,420	-\$ 1,793	-\$ 35,160

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.⁷

The director denied the petition on December 4, 2007. He concluded that none of the tax returns demonstrated sufficient resources to pay the proposed wage offer of \$56,160 and denied the petition accordingly.

⁵For 2004, 2005 and 2006, the petitioner filed its taxes as an S corporation. Where an S corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (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. 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 17e (2004 and 2005) or line 18 (2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 17e in 2004 and 2005 and on line 18 in 2006.

⁶ 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, 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.

⁷ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

On appeal, current counsel resubmits copies of the sole proprietor's individual tax returns for 2001, 2002, and 2003 and additionally provides a copy of the sole proprietor's 2005 individual tax return. He also resubmits copies of the corporate petitioner's 2005 and 2006 tax returns. Counsel initially asserts that the beneficiary will not replace a U.S. citizen worker as the individual is no longer employed by the petitioner. He then cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) in contending that the beneficiary's skills will significantly increase the petitioner's revenue. Counsel additionally asserts that the director misinterpreted the tax returns in that current assets clearly exceed current liabilities because on Statement 5, current liabilities are prepaid advances by customers and would be converted to income as the work is performed and should not be counted as a liability for purposes of determining the ability to pay the proffered wage. Counsel does not identify the tax return to which he refers, but the only return offered on appeal that contains a reference to prepaid expenses is the petitioner's 2006 corporate return.

With respect to counsel's statement that the beneficiary will replace a worker whose 2006 W-2 was submitted to the underlying record and according to counsel has now departed the petitioner's employment, it is noted that in general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary as of the priority date of the petition, which in this case was April 9, 2001, and continuing to the present. Moreover, there is no first-hand evidence that the position of this departed individual involved the same duties as those set forth in the Form ETA 750. It is noted that this person was paid almost \$13,000 less in 2006 than the proposed wage offer of the beneficiary which was established in 2001. Nothing shows the wages paid to this individual from 2001 to 2005. The record has not credibly documented the position, duty, and commencement of employment and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. The assertions of counsel are not persuasive in this respect. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner has not established its ability to pay the proffered wage of \$56,160 per year. It is noted that if a 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Here, as noted by the director, there is no evidence that the petitioner has employed the beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent 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.

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 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* at 537 (emphasis added).

In this case, the petitioner was structured as a sole proprietorship in 2001, 2002 and the first six months of 2003. When a petitioner is a sole proprietorship, additional factors will be considered. 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. As noted above, the business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return (line 12). 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). Such petitions often include a summary of household expenses. In this case, the petitioner was requested to provide such expenses, but failed to submit them in response to the director's request for evidence. The petitioner did not provide documentation of other cash or cash equivalent current assets not reflected on the sole proprietor's individual tax returns. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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.

In this case as illustrated above, although the sole proprietor claimed fewer dependents than in *Ubeda*, even without considering household expenses, the proffered wage of \$56,160 represented almost 64% of the sole proprietor's adjusted gross income in 2001. The proffered salary exceeded the sole proprietor's adjusted gross income of \$46,508 in 2002 by \$9,652. In 2003, if comparing the one half of the sole proprietor's adjusted gross income to one half of the certified wage, the sole proprietor's adjusted gross income would be \$43,938.50 and one half of the proffered wage (\$28,080) would also represent approximately 64% of the sole proprietor's adjusted gross income. The AAO does not conclude that the petitioner has demonstrated its ability to pay the proposed wage offer of \$56,160 during this period of time.

Although an approximate calculation based on the incorporation date of the petitioner, as set forth above, the petitioner's 2003 corporate tax return, showed that neither one half the petitioner's net income of -\$1,001 nor one half of its net current assets of -\$17,376 was sufficient to cover one-half of the proffered wage, calculated at \$28,080.

Similarly, in 2004, the petitioner's federal tax return reflected that neither its -\$2,002 in net income nor its net current assets of \$28,420 was sufficient to cover the proffered wage of \$56,160. The petitioner's ability to pay the proffered salary has not been established in 2004.

In 2005, neither the petitioner's net income of \$7,899 nor its net current assets of -\$1,793 was close to the amount required to pay the proffered wage of \$56,160 in this year. The petitioner's ability to pay the certified wage has not been demonstrated in 2005.

In 2006, as shown above, neither the petitioner's net income of \$18,426 nor its net current assets of -\$35,160 was sufficient to cover the proffered salary. It is noted that even if counsel's suggestion of reducing the petitioner's current liabilities shown on Schedule L of the 2006 tax return by the amount of prepaid expenses, which was claimed on Statement 5 as \$79,972, the resulting figure for net current assets would be \$44,814, which is still \$11,346 less than the proffered wage of \$56,160 and does not demonstrate the ability to pay the proffered wage.

Counsel asserts that due to the beneficiary's skills, the petitioner's revenue will significantly increase because he is a highly skilled artisan and has his own clientele. Counsel relies on *Matter of Sonogawa, supra* for this contention, but provides no detail or documentation in support. This hypothesis cannot be concluded to outweigh the evidence presented in the tax returns. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

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.

As counsel noted, *Matter of Sonogawa*, is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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 *Sonogawa* was based in part on the petitioner's sound business reputation, historical growth and outstanding reputation as a couturiere. In this case, two out of the four petitioner's corporate tax returns provided to the record reflect losses as net income and all four reflect losses as net current assets. Moreover, counsel's undocumented assertions as to the beneficiary's capacity to significantly increase the petitioner's profits do not constitute evidence and do not establish such analogous circumstances to *Sonogawa* that would overcome the evidence reflected in the

tax returns. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* that are persuasive in this matter. The AAO can not conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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.