

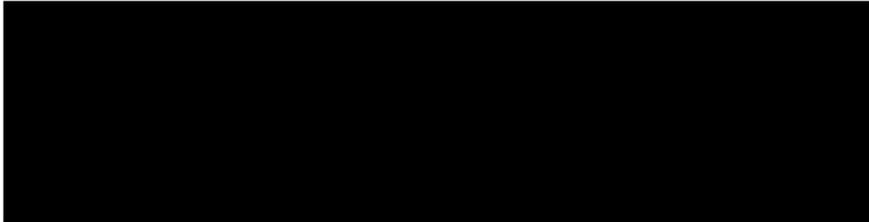
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: OCT 06 2010

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

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 runs a [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a gas station manager pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

In adjudicating the petition, the director found that the approved Form ETA 750 labor certification was filed by and issued to a company named [REDACTED]. The petitioner did not deny that the approved labor certification was for another company but claimed in response to the director's request for evidence (RFE) that the petitioner had bought [REDACTED] in July 2001 and had fully assumed the labor certification previously filed on behalf of the beneficiary since then. The director, however, found no evidence that the petitioner bought [REDACTED] or that it became the successor-in-interest to [REDACTED]. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 29, 2008 denial, the single issue in this case is whether or not the petitioner is the successor-in-interest to Tara Management.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On April 30, 2001, [REDACTED] filed and the Department of Labor (DOL) accepted the Form ETA 750 for processing. The record shows that the DOL approved that labor certification form on September 13, 2002. On October 27, 2003, the petitioner filed with United States Citizenship and

¹ Section 203(b)(3)(A)(iii) of 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.

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).

Immigration Services (USCIS) the Form I-140 petition along with the approved labor certification for Tara Management. The director noted this deficiency and requested that the petitioner submitted additional evidence.

Copies of the following evidence were subsequently submitted to show that the petitioner is the successor-in-interest to [REDACTED]

[REDACTED]

Based on the evidence submitted, the director stated that the petitioner was not a successor-in-interest to [REDACTED] according to the director, only agreed to rent the property on [REDACTED] and did not assume any rights, duties, obligations, or assets of [REDACTED]

On appeal, the petitioner submits a document entitled [REDACTED] in which [REDACTED] agreed to purchase and [REDACTED] agreed to sell a [REDACTED] known as [REDACTED]

[REDACTED] The document was signed by [REDACTED] on July 1, 2001. Counsel for the petitioner asserts that this document establishes that the petitioner is a successor-in-interest assuming the assets, obligations, and liabilities of [REDACTED]

Upon *de novo* review, the AAO agrees with the director that the petitioner is not the successor-in-interest to [REDACTED]. The document submitted on appeal in and of itself does not show that the petitioner acquired the essential rights and obligations of the predecessor company necessary to carry on the business in the same manner as the predecessor.

The only way for the petitioner to be able to use a Form ETA 750 approved for a different employer is if the petitioner establishes that it is a successor-in-interest to that employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*). In this matter, the record is devoid of such evidence. 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. *Matter of Dial Auto* is an AAO decision designated as precedent by the Commissioner. The regulation at 8

³ [REDACTED] according to the tax returns in the record, is the sole owner of [REDACTED] or the petitioner.

C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act.

By way of background, *Matter of* [REDACTED] involved a petition filed by [REDACTED], Inc. [REDACTED] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [REDACTED] filed the underlying labor certification. On the petition, [REDACTED] claimed to be a successor-in-interest to [REDACTED]. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between [REDACTED] and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to [REDACTED] counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [REDACTED] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of [REDACTED] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987)*. Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing. (All emphasis added).

The legacy INS and U.S. Citizenship and Immigration Services (USCIS) has, at times, strictly interpreted *Matter of* [REDACTED] to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of* [REDACTED] the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987). This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

In view of the above, *Matter of* [REDACTED] did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid

successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

The record in this matter is wholly devoid of evidence that the petitioner is the successor-in-interest to the employer identified in the Form ETA 750. The document submitted on appeal in and of itself does not show that the petitioner continues to operate the same type of business as the predecessor company or that the beneficiary will be performing the same duties as those advertised on the approved labor certification. The AAO finds that [REDACTED] is not a successor-in-interest to [REDACTED].

Beyond the decision of the director, the AAO also finds that the petitioner has failed to meet its burden of establishing by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The priority date in this case fell on April 30, 2001, as that was the date when the DOL accepted the Form ETA 750 for processing. The rate of pay set by the DOL, as stated on the Form ETA 750

labor certification, is [REDACTED] per hour or [REDACTED] per year. The petitioner indicated in part B of the Form ETA 750 that the beneficiary had worked for the petitioner since 1997.

To show that it had the ability to pay \$15.81 per hour or \$32,884.80 per year from April 30, 2001 the petitioner submitted copies of the following evidence:

[REDACTED]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation, with [REDACTED] as the only shareholder and officer of the corporation. On the petition, the petitioner claimed to have been established in April 1996,⁴ to have gross annual income and net annual income of [REDACTED] and [REDACTED] respectively, and to currently employ 3 workers.

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 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.

Here, even though the petitioner has asserted in part B of the Form ETA 750 that it has employed the beneficiary as a manager since 1997, no evidence such as W-2, 1099-MISC, paystubs, or payroll or accounting records has been submitted to support that assertion. A review of the petitioner's quarterly federal tax returns for 2003 and 2004 does not show the beneficiary's name in the payroll records. A mere claim by the petitioner concerning the beneficiary's employment cannot by itself demonstrate the reliability of that claim or statement. Going on record without supporting

⁴ A search of Ohio Secretary of State's website shows that [REDACTED] or the petitioner was incorporated on May 14, 2001.

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)).

When the petitioner fails to 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service should have considered income before expenses were paid rather than net income.

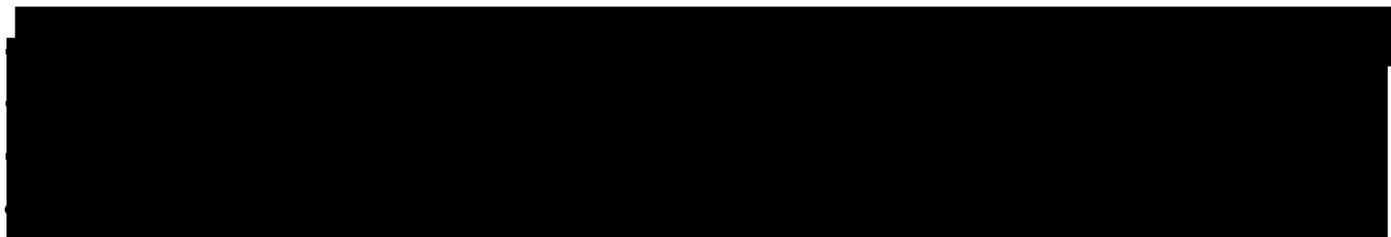
With respect to depreciation, the court in *River Street Donuts* noted:

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 118. “[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).

The record before the director closed on October 13, 2004 with the receipt by the director of the petitioner’s submissions in response to the director’s RFE. As of that date, the petitioner’s 2004 federal tax return was not yet due. Therefore, the petitioner’s income tax return for 2003 is the most recent return available. The petitioner’s tax returns demonstrate its net income (loss) for 2001-2003, as shown in the table below.



Therefore, except for 2001, the petitioner did not establish that it had sufficient net income to pay the proffered wage of [redacted] per year.

As an alternate means of determining the petitioner’s ability to pay the prevailing 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.⁷ The year-end current assets of a limited liability

⁵ 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 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf> (accessed on April 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In the instant case, the AAO observes that the petitioner had additional income, credits, deductions, and other adjustments from sources other than a trade or business. Therefore, the corporations’ net income (loss) between 2001 and 2003 is found on Schedule K of its tax returns.

⁶ The AAO will consider [redacted] net income and net current assets as if the petitioner were the successor-in-interest to [redacted] for purposes of the ability to pay adjudication, even though the record does not establish the petitioner is a successor-in-interest to Tara Management.

⁷ 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,

company reporting on Form 1065 are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of the entity'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 tax returns for 2002 and 2003 stated its net current assets, as detailed in the table below.

- In 2002, the Form 1120S stated net current assets of [REDACTED]
- In 2003, the Form 1120S stated net current assets of [REDACTED]

Therefore, the petitioner failed to establish that it had sufficient net current assets to pay the proffered wage in 2002 and 2003.

Based on the net income and net current assets analysis above the petitioner has not established that it has the continuing ability to pay the beneficiary the proffered wage from the priority date, specifically in 2002 and 2003.

Further, the AAO cannot accept any of the financial statements submitted as evidence of the petitioner's ability to pay since none of them was audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. In the instant case, none of the financial statements submitted is accompanied by a statement indicating that the financial or income statement has been audited. As the accountant's report makes clear, the financial statements were produced pursuant to a compilation which consists of the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are therefore insufficient to demonstrate the ability to pay the proffered wage.

Finally, 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 Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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

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.

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, no argument has been presented or evidence provided to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence, reflecting the company's reputation or historical growth since its inception in 2001. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments. The evidence submitted also does not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage in 2002 and 2003.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. Accordingly, after a review of the petitioner's tax returns and other evidence, the AAO is not persuaded that the petitioner has that ability. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.