

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date:

**JAN 03 2011**

IN RE:

Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 \$630. 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 is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, foreign specialty ("Pakistani specialty cook"). 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). The director determined that the petitioner had not demonstrated its ability to pay the proffered wage. 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 March 24, 2008 denial, the issue in this case is whether the petitioner has the ability to pay the proffered wage from the date the labor certification was filed onward.

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 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, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, 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).

Here, the Form ETA 750 was accepted on April 3, 2002.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689 per year). The Form ETA 750 states that the position requires two years of experience as a Pakistani specialty cook.

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.<sup>2</sup>

---

<sup>1</sup> The instant petition is for a substituted beneficiary. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

The petitioner did not submit Form ETA 750B for the substituted beneficiary. The original beneficiary shared the same surname as the petitioner's owner and was from the same district in Pakistan as the owner. The petitioner's owner claims that he is unrelated to any of the sponsored workers, but that the surname is common. While the name might be common, review of the original labor certification and a related file shows that the petitioner's owner is the original beneficiary's brother. The petitioner was specifically asked to address the owner's relationship to the original beneficiary, but failed to do so. 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); see also *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) ("Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."). This raises the issue of whether the position is truly bona fide.

<sup>2</sup> 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

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1997 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is the same as the calendar year.

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 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. The petitioner submitted no evidence that it has ever employed or paid the beneficiary any wages.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010). 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

---

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

expenses were paid rather than net income. *See Taco Especial*, 696 F. Supp. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on December 17, 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 2006 federal income tax return was the most recently available return. Despite being requested to provide information concerning the petitioner’s continued ability to pay from 2007 onward<sup>3</sup> in a Notice of Intent to Deny (“NOID”) sent by the AAO, the petitioner provided no additional tax returns or other regulatory proscribed evidence for 2007 or 2008.<sup>4</sup> The failure to submit requested evidence that precludes a material line of inquiry

---

<sup>3</sup> 8 C.F.R. § 204.5(g)(2) provides “The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.”

<sup>4</sup> Based on the date of filing, the petitioner’s 2009 return may not have been available in response to the NOID.

shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The tax returns in the record for 2002 to 2006 show the following:<sup>5</sup>

- The 2002 Form 1120 stated net income of \$26,719.
- The 2003 Form 1120 stated net income of \$32,104.
- The 2004 Form 1120 stated net income of -\$8,502.
- The 2005 Form 1120 stated net income of -\$1,704.
- The 2006 Form 1120 stated net income of -\$3,477.
- The 2007 Form 1120 was not submitted.
- The 2008 Form 1120 was not submitted.

If this beneficiary were the only beneficiary for which the petitioner had filed a petition, the net income in 2002 and 2003 would have been sufficient, however, USCIS electronic records show that the petitioner filed four other Form I-140 petitions, which have been pending during the time period relevant to the instant petition.<sup>6</sup> If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce

---

<sup>5</sup> The tax returns in the record are for a company called [REDACTED]. Although this is not the name of the petitioning entity on the Form I-140, the Tax Identification Numbers are the same and the petitioner submitted a business license issued by the Department of Consumer and Regulatory Affairs of the District of Columbia showing that [REDACTED] the stated petitioner, is the operating or trade name for [REDACTED].

<sup>6</sup> In response to the AAO's NOID, counsel states that the petitioner has filed only two additional I-140 petitions, but submits records from its bank stating that it has three escrow accounts, listing three separate individuals other than the beneficiary, which it claims are accounts set aside for beneficiaries' wages. USCIS records show that the petitioner filed four additional Forms I-140: for [REDACTED] (priority date of February 14, 2003, petition approved), [REDACTED] (priority date of April 19, 2001, petition approved), [REDACTED] (priority date of February 7, 2002, petition approved), and [REDACTED] (priority date of March 12, 2002, petition approved). In determining eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. §103.2(b)(16)(ii). The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, any wages paid to those workers, about the current immigration status and whether they have adjusted to permanent residence or employment of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 tax returns demonstrate its end-of-year net current assets for tax years 2001, 2002, 2004, 2005, and 2006, as shown in the table below.

- The 2002 Form 1120 stated net current assets of \$42,898.
- The 2003 Form 1120 stated net current assets of \$75,407.
- The 2004 Form 1120 stated net current assets of \$0.<sup>8</sup>
- The 2005 Form 1120 stated net current assets of \$66,816.
- The 2006 Form 1120 stated net current assets of \$25,140.

---

<sup>7</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>8</sup> On IRS Form 1120, corporations with total receipts (line 1a plus lines 4 through 10 on page 1) and total assets at the end of the tax year less than \$250,000 are not required to complete Schedules L and M-1 if the "Yes" box on Schedule K, question 9, is checked. *See* <http://www.irs.gov/instructions/i1120> (accessed November 15, 2010). Here, the petitioner's total assets for 2004 are less than \$250,000 and the petitioner checked "yes" to question 9.

- The 2007 Form 1120 was not provided despite the AAO's request.
- The 2008 Form 1120 was not provided despite the AAO's request.

Again, although the net current assets of the petitioner exceed the proffered wage in 2002, 2003, 2005, and 2006, it has filed petitions for four additional workers so must demonstrate that its net current assets are sufficient to pay the proffered wage for all of the sponsored workers (four total workers in 2002, five total workers in 2003 and onwards). The petitioner did not demonstrate sufficient net current assets in 2004 to cover the proffered wage for this beneficiary or any of the other sponsored workers.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner did not establish its continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, and its net income and net current assets.

Counsel states that the petitioner has proven its ability to pay the proffered wage by submitting one year's salary into an escrow account specifically named for the beneficiary (and counsel states that the petitioner took this action for all sponsored workers). Counsel states that as the money was submitted to "establish the availability of the funds" for the proffered wage, and those funds are "not reflected on Schedule L of the tax return." The petitioner submitted letters from the Assistant Branch Manager for [REDACTED] and a personal banker for [REDACTED] establishing the creation of these escrow accounts. Letters dated July 26, 2010 from [REDACTED] established that an account for the benefit of [REDACTED] was established in February 2002 with a balance of \$25,096.80 and an account for benefit of [REDACTED] was established in February 2002 with a balance of \$25,089.91. A letter dated July 23, 2010 from [REDACTED] established that an account for benefit of I.K. [REDACTED] was established in May 2000 with a balance of \$33,020.76. Nothing in the record establishes that these amounts were available as of the priority date and the letter from [REDACTED] states that the balance for [REDACTED] was a result of multiple deposits.

The instructions for completing Schedule L, per the IRS, state: "The balance sheets should agree with the corporation's books and records." See <http://www.irs.gov/instructions/i1120/ch02.html#d0e3651> (accessed December 23, 2010). The petitioner presented no evidence to show how these cash accounts would not appear in the corporation's books and/or records, or to show where the funds would be verified on Schedule L as an asset held by the company. Although the funds may have been set aside for a particular purpose, in this case, the wages of the beneficiary, they still belong to the corporation and would appear in any accounting of the petitioner's assets and should appear in a calculation of the petitioner's net current assets. In addition, we note that these accounts only contain the proffered wage for one year. As a result, the account could have been depleted in the first year of use and would thus not have funds available to pay the proffered wage in any additional year.<sup>9</sup> The escrow account(s) is thus

<sup>9</sup> Assuming that the other four beneficiaries had the same proffered wage as the beneficiary's, the petitioner's financial situation would have occurred as follows had all beneficiaries (B1-B5) started

inadequate to establish the petitioner's ability to pay the proffered wage in all of the years from the time that the labor certification was accepted onwards.

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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

---

working as of their priority date:

- 2002: \$42,898 net current assets (that number being greater than the net income) used to pay B1 salary in full and \$18,209 of B2's salary, the remaining \$6,480 of B2's salary would come from escrow funds; B3 and B4's salary paid through escrow funds (B5's priority date is 2003 so the petitioner need not show the ability to pay B5's proffered wage in 2002).
- 2003: \$75,407 net current assets used to pay B3, B4, and B5's salary in full; B1's salary paid from escrow funds; B2's salary paid \$1,340 from net current assets and the rest from escrow funds.
- 2004: Escrow funds pay \$19,549 of B1's salary, leaving \$5,140 unfulfilled; B2-B5's salaries cannot be paid as the escrow funds were previously depleted; the petitioner's net income was negative and it demonstrated no net current assets for 2004 so that the petitioner demonstrated no funds available to pay any of the beneficiaries' wages.
- 2005 & 2006: The petitioner's net income and net current assets are insufficient to establish the ability to pay the proffered wages for all beneficiaries. Escrow funds for B1-B5 would have been depleted in years above and unavailable for these years.
- 2007 & 2008: The petitioner did not provide its tax returns despite the AAO's request. 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).

The petitioner has demonstrated steady, but minimal gross receipts in the \$230,000-\$255,000 range for all six years in the record. The corresponding net income has also been minimal or negative in all years and the total amount of wages paid was also minimal. In 2002 and 2004, the total amount of wages paid to all workers was less than the proffered wage for the beneficiary and the 2003 total wages paid was only slightly more than the proffered wage. The tax returns reflect no officer compensation paid in any year. In addition, the petitioner submitted no evidence of its reputation, that it had one off year, or any other information to liken its situation to the one presented in *Sonegawa*. Thus, viewing the totality of the circumstances, the petitioner has not demonstrated its ability to pay the proffered wage.

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.