

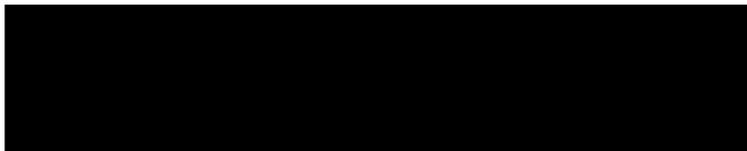
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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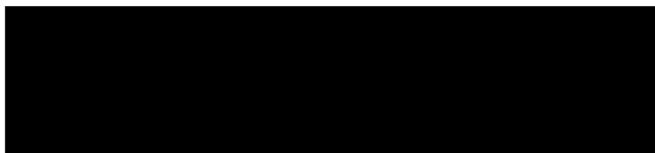
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Date: **JUL 07 2011** Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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:



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.

Elizabeth McCormack

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 franchisee of [REDACTED] in Philadelphia, Pennsylvania. It seeks to employ the beneficiary permanently in the United States as an unskilled laborer, 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). The director determined that the beneficiary did not meet the job requirements as set forth on the Form ETA 750, and therefore, was not qualified for the position offered. The petition was denied, 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 July 28, 2010 denial, the single issue in this case is whether or not the beneficiary had the requisite work experience to perform the duties of the position before the petitioner filed the Form ETA 750 with the DOL.

Consistent with the *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor (DOL) – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 23, 2001. The position for which the petitioner sought to hire is “doughnut maker.” Under section 14 of the Form ETA 750, part A, the petitioner specifically required each applicant for this position to have a minimum of six months experience in the job offered. Under the job description, the petitioner stated that the duties to be performed included, in part, weighing and measuring, loading and unloading machines, bins, hoppers, racks, ovens, and keeping the equipment clean.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm.

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.

1986). *See also, Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires the beneficiary to have a minimum of six months of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on April 5, 2001, he represented that he worked as [REDACTED] at a [REDACTED] in Collingdale, Pennsylvania, from January 1999 to August 1999 and for the petitioner from November 1999 to the present date. Submitted along with the approved Form ETA 750 and the petition was a signed statement dated [REDACTED] certifying that the beneficiary was employed by [REDACTED] in Collingdale, Pennsylvania, from January 1, 1999 to August 1, 1999.

On April 12, 2010, the director issued a request for evidence (RFE), advising the petitioner to submit, among other things, copies of the beneficiary's Forms W-2 or 1099-MISC for 1999 and his individual tax return for the year 1999 to demonstrate that the beneficiary worked for [REDACTED] between January 1, 1999 and August 1, 1999.

In response to the director's RFE, the beneficiary issued an affidavit, stating:

I did work there [referring to [REDACTED]] from January 1999 through August 1999; however, I did not have a social security number and I was not on the books with the company. I was paid with cash. I did not file taxes in 1999. I did not receive my social security number until end of 2000 and that is when I started paying taxes.

In the decision denying the petition, the director found that [REDACTED] was not established until February 16, 1999. The director deemed the beneficiary's affidavit as unreliable, since it was not supported by other corroborating documents, i.e. Forms W-2 or 1099-MISC. The director also determined that the beneficiary's affidavit did not resolve the inconsistencies in the record regarding the dates of his employment at [REDACTED]

On appeal, counsel for the petitioner maintains that the beneficiary had at least six months of work experience as a doughnut maker before the priority date, and therefore, qualifies for the position offered. Counsel submits the following evidence to support his assertions:

- A letter dated August 20, 2010 from [REDACTED] stating that he was [REDACTED] of the [REDACTED] before he sold it to [REDACTED] in February 1999, that the beneficiary was his employee in [REDACTED], and that [REDACTED] renamed the store to [REDACTED] after the purchase; and
- A letter dated [REDACTED] claiming that he bought the [REDACTED] from [REDACTED] in February

1999, and that the beneficiary continued to work at the store as a doughnut maker until August 1, 1999.

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

Upon *de novo* review, the AAO finds that the petitioner has not submitted sufficient evidence to demonstrate that the beneficiary had the minimum work experience in the job offered before the priority date. As noted above, the first letter submitted by [REDACTED] dated October 30, 2001, stated that the beneficiary worked for the [REDACTED] beginning January 1, 1999. On appeal, the petitioner submitted different evidence from [REDACTED] indicating that the beneficiary worked for a different employer at the same location from January 1, 1999 – February 16, 1999. 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).

On appeal, [REDACTED] states in a letter dated August 20, 2010 that he owned the [REDACTED] location before he sold it to [REDACTED] and that the beneficiary was his employee for six weeks beginning on January 1, 1999. The record, however, contains no evidence, such as copies of the company's payroll records, accounting records, or other documents, corroborating the veracity of [REDACTED] statements. [REDACTED] does not explain how he remembers that the beneficiary was his employee working as a doughnut maker for six weeks from January 1 to February 16, 1999. He does not attach evidence that he owned the [REDACTED] or that he sold the franchise to [REDACTED].

On appeal, [REDACTED] claims in a letter dated August 20, 2010 that [REDACTED] bought the [REDACTED] store at the [REDACTED] location from [REDACTED] on February 16, 1999. He does not attempt to explain why the October 30, 2001 letter from [REDACTED] does not mention the purchase of the store from another location on February 16, 2001, and does not attach evidence documenting the purchase. 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)). [REDACTED] does not state why [REDACTED] misrepresented the start date of the beneficiary's employment in the October 30, 2001 letter, or why it failed to disclose that the beneficiary worked for another employer from January 1 – February 16, 1999.

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).

Further, as noted above, the beneficiary states in an affidavit dated May 13, 2010 in response to the director's Request for Evidence (RFE), that he worked for [REDACTED] from January 1, 1999 – August 1, 1999. He does not mention that his employer changed on February 16, 1999, or that the company changed its name to [REDACTED] while he worked there.³

In view of the inconsistencies of record regarding the ownership of the [REDACTED] franchise at [REDACTED], Collingdale, PA, and the lack of independent, objective documentation overcoming these inconsistencies, the AAO finds that the letters of [REDACTED] and [REDACTED] dated August 20, 2010 do not overcome the director's finding that the beneficiary is not qualified for the position. The AAO finds the letters not credible, and do not establish that the beneficiary was qualified for the position offered as of the priority date.

In addition, the letter dated October 30, 2001 from [REDACTED] does not sufficiently describe the job duties of the beneficiary to establish his experience as a doughnut maker for six months. The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) provides:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

[REDACTED] October 30, 2001 letter described the beneficiary's job duties as follows:

He worked as a donut baker and finisher in the kitchen as well as cleaned all the kitchen equipment as per the requirement of the [REDACTED] standard procedures.

This description of the job duties falls short of establishing that the beneficiary acquired experience in the job duties described on the Form ETA 750A at part 13. For this additional reason, the record does not establish that the beneficiary has the requisite work experience to qualify for the position offered as of the priority date.

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2) provides, 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

³ In his August 20, 2010 letter, [REDACTED] states that [REDACTED] renamed the store to [REDACTED] after the February 1999 purchase.

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

As noted earlier, the petitioner filed the Form ETA 750 with the DOL on April 23, 2001. The rate of pay or the proffered wage set by the DOL and agreed by the petitioner is \$7.49 per hour or \$15,579.20 per year.

To show that the petitioner has the ability to pay \$7.49 per hour or \$15,579.20 per year beginning on April 23, 2001, the petitioner initially submitted copies of the following evidence:

- Internal Revenue Service Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2001-2005.

In adjudicating the petition, the director found that the petitioner had filed multiple petitions for other beneficiaries since the priority date.⁴ Because of this finding, the director issued an RFE on April 12, 2010, noting that the petitioner would need to demonstrate its ability to pay the proffered wage to each beneficiary from the priority date until each beneficiary obtains his or her legal permanent residence. The director advised the petitioner to produce a list of all employment-based petitions it had filed with USCIS since 2001 (the priority date). The director also requested that the petitioner submit copies of its most recent federal tax returns, annual statements, or audited financial statements and all of the Forms W-2 or 1099-MISC ever issued to all of its beneficiaries.

In response to the director's RFE, the petitioner submitted the following evidence:

- A list of all I-140 petitions that the petitioner has filed with USCIS;
- Copies of the beneficiary's Forms W-2 for the years 2001 through 2009, except 2003;
- Copies of other beneficiaries' Forms W-2; and
- Copies of its Forms 1120S for 2006-2009.

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 August 1997 and to currently employ 19 workers. In addition, the record shows that the petitioner had filed two other employment-based petitions besides this one since the priority date. This petition and the other two petitions all have the same priority date (April 23, 2001).⁵

⁴ The director did not give specific information as to how many other petitions the petitioner had filed since the priority date. Nor did the director specify the names of the other alien beneficiaries being sponsored by the petitioner. A search of the USCIS electronic records reveals that there are 416 petitions filed by a company called "[REDACTED]." Not all of 416 petitions are related to the petitioner, however.

⁵ The receipt numbers of the other two petitions are as follows: [REDACTED] and [REDACTED]. A search of the USCIS electronic records shows that the two petitions bearing those receipt numbers belong to the petitioner.

Since this matter involves multiple filings, the petitioner must establish that its job offer to each 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 each 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 each beneficiary's proffered wage, 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 examine whether the petitioner employed and paid all of the beneficiaries 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.

Based on the Forms W-2 submitted, the petitioner paid the beneficiary the following wages between 2001 and 2009 (all in \$):

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2001	31,115.00	15,579.20	Exceeds the PW
2002	29,090.00	15,579.20	Exceeds the PW
2003	-	15,579.20	(15,579.20)
2004	5,904.00	15,579.20	(9,675.20)
2005	8,428.00	15,579.20	(7,151.20)
2006	22,744.00	15,579.20	Exceeds the PW
2007	26,880.00	15,579.20	Exceeds the PW
2008	22,800.00	15,579.20	Exceeds the PW
2009	16,200.00	15,579.20	Exceeds the PW

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay the difference between the wage that the petitioner actually paid the beneficiary and the wage set by the DOL on the approved Form ETA 750 (the proffered wage), which is \$15,579.20 in 2003; \$9,675.20 in 2004; and \$7,151.20 in 2005.

In addition to those amounts in 2003, 2004, and 2005, the petitioner must also be able to pay the proffered wages of the other two beneficiaries ("B1 and B2"). The table below shows the proffered wages of the other two alien beneficiaries being sponsored by the petitioner (as

provided by the petitioner) and the payments they received from the petitioner between 2001 and 2009 (all in \$):

Tax Year	Actual Wage (AW1)	B1		Actual Wage (AW2)	B2	
		Proffered Wage/year (PW1)	AW1 less PW1		Proffered Wage/year (PW2)	AW2 less PW2
2001	6,305.00	15,579.20	(9,274,.20)	14,826.96	13,520.00	Exceeds PW2
2002	-	15,579.20	(15,579.20)	10,384.72	13,520.00	(3,135.28)
2003	-	15,579.20	(15,579.20)	10,000.12	13,520.00	(3,519.88)
2004	34,600.00	15,579.20	Exceeds PW1	19,869.38	13,520.00	Exceeds PW2
2005	38,400.00	15,579.20	Exceeds PW1	23,850.00	13,520.00	Exceeds PW2
2006	38,480.00	15,579.20	Exceeds PW1	23,400.00	13,520.00	Exceeds PW2
2007	36,034.00	15,579.20	Exceeds PW1	40,012.50	13,520.00	Exceeds PW2
2008	36,009.00	15,579.20	Exceeds PW1	44,775.00	13,520.00	Exceeds PW2
2009	30,451.00	15,579.20	Exceeds PW1	51,300.00	13,520.00	Exceeds PW2

Therefore, the petitioner must be able to show that it can pay the following wages from 2001 to 2005:

- \$9,274.20 in 2001 (the difference between AW1 and PW1, as shown above);
- \$18,714.48 in 2002 (\$15,579.20 + \$3,135.28);
- \$34,678.28 in 2003 (\$15,579.20 + \$15,579.20 + \$3,519.88);
- \$9,675.20 in 2004 (the difference between AW and PW, as shown above); and
- \$7,151.20 in 2005 (the difference between AW and PW, as shown above).

The petitioner can show that it can pay these amounts through either its net income or net current assets. If the petitioner chooses to pay these amounts through its net income, USCIS will 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873 (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 the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. 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 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 petitioner’s tax returns demonstrate its net income (loss) for 2004-2006, as shown below:

- In 2001 the Form 1120 stated net income (loss)⁶ of \$33,845 (line 21 of the Form 1120S).
- In 2002 the Form 1120 stated net income (loss) of \$31,008 (line 23 of schedule K).
- In 2003 the Form 1120 stated net income (loss) of \$46,669 (line 21 of the Form 1120S).
- In 2004 the Form 1120 stated net income (loss) of \$33,297 (line 21 of the Form 1120S).
- In 2005 the Form 1120 stated net income (loss) of \$25,252 (line 17e of schedule K).

⁶ For an S corporation, USCIS considers net income (loss) to be the figure shown on line 21 of the Form 1120S so long as the S corporation has no other income, credits, deductions or other adjustments from sources other than a trade or business. Otherwise, the net income (loss) is found on line 23 (2002), line 17e (2005), or line 18 (2006-2009) of schedule K. *See Instructions for Form 1120S, 2006*, at <http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf> (accessed on June 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.).

Based on the information above, the petitioner has sufficient net income to pay the wages of all of its claimed beneficiaries from the priority date.

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*. After a review of the relevant evidence, the AAO is persuaded that the petitioner has that ability. We conclude that the petitioner has met the burden of proving by a preponderance of the evidence that it has the ability to pay the beneficiary and the two other sponsored workers each his or her proffered wage continuously from the priority date.

It appears that the petitioner has the continuing ability to pay the proffered wage from the priority date, if these are the facts. However, USCIS records reflect that [REDACTED] – the trade name under which the petitioner uses to file the petition in this proceeding – has filed over 400 immigrant visa petitions. The AAO has not investigated whether any of those 400 immigrant visa petitions belong to the petitioner. Therefore, this office will not make a finding on the petitioner's ability to pay at this time.

Based on the evidence submitted, the petitioner has not met its burden of proving by a preponderance of the evidence that the beneficiary qualifies for the position offered. 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.