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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 and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 23 2011

IN RE: Petitioner: [redacted]
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:

[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 $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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the labor certification. *See* 8 C.F.R. § 204.5(g)(2).

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

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i), an applicant for a Schedule A position would file Form I-140, "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program."[1] The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Permanent Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). Also, according to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing

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

Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment, or (3) that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 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 the continuing ability to pay the proffered wage beginning on the priority date. In the case at hand, the priority date is June 24, 2008, the date on which the petitioner submitted the ETA Form 9089 and Form I-140 Immigrant Petition to the USCIS. The proffered wage as stated on ETA Form 9089 for the position of a nurse is $26.15 per hour ($54,392.00 per year).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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, counsel stated on appeal that the petitioner filed 105 Forms I-140, Immigrant Petition for Alien Worker, in 2007. Further, USCIS electronic records show that the petitioner filed and additional 65 Form I-140 petitions in 2008 and 2009.

Where, as here, a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce 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 ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

As evidence of its ability to pay the proffered wage, the petitioner submitted copies of audited financial statements dated May 5, 2007[2] and August 31, 2008.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, there is no evidence in the record that the petitioner employed and paid the beneficiary of the instant petition, or any of the beneficiaries of the other Form I-140 petitions which were pending or filed as of the priority date.

If, as here, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *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 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. *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

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[2] As noted above, the priority date in this case is June 24, 2008. Therefore, the petitioner is not required to establish its ability to pay the proffered wage in 2007. However, the evidence in the record relating to 2007 will be considered generally in determining the petitioner's ability to pay the proffered wage.

> 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).

According to the petitioner's audited financial statement, the petitioner's net income for 2008 was -$38,933.00. Therefore, the petitioner did not have sufficient net income to pay the proffered wage of the instant Form I-140 petition or of the other petitions filed or pending in 2008.

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.[3] 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 audited financial statement for 2008 demonstrates that the petitioner had net current assets of $4,771,211.00. Although this exceeds the proffered wage for the instant beneficiary, the petitioner, as noted above, has filed numerous I-140 petitions. The combined proffered wages for all petitions filed in 2007, according to counsel, is $5,569,200.00. Counsel has provided a list of all Form I-140 petitions filed by the petitioner in 2007. There is no evidence in the record that the beneficiaries of any of these petitions had obtained permanent residency as of the priority date. Therefore, the petitioner must establish its ability to pay the proffered wages for these beneficiaries

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[3]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.

as of the priority date. The combined proffered wages for all petitions filed in 2007 exceeds the petitioner's net current assets in 2008. In addition, as noted above, the petitioner filed numerous additional petitions in 2008. Thus, the record does not establish that the petitioner had sufficient net current assets to pay the proffered wage in 2008.

On appeal, counsel states that there is another way to establish the petitioner's ability to pay the proffered wage. Specifically, counsel states that the beneficiary's proposed employment will result in increased income to the petitioner in excess of the proffered wage. In support of this, counsel has submitted copies of contracts with healthcare facilities at which the petitioner has placed nursing staff. However, counsel's argument in this regard is speculative. The contracts do not appear to guarantee employment for any beneficiary. Instead, the healthcare facilities use the petitioner's services as-needed. Thus, if the healthcare facilities do not have a need for the beneficiary's services, then the beneficiary will not generate income for the petitioner. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. at 144-145 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.

Because the record does not establish that the petitioner had the ability to pay the proffered wage in 2008, this office issued a Request for Evidence (RFE) on October 5, 2010 which requested additional evidence to demonstrate that the petitioner had the ability to pay the wages for all the petitions filed and pending from 2008 to the present.

In response, counsel submitted a brief in which she cites *Matter of Sonegawa*, 12 I&N Dec. 612, and states that USCIS should consider the "totality of the facts" in considering the petitioner's ability to pay the proffered wage.

Counsel is correct that 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 id.* 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 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 this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. As discussed above, the petitioner in this case has filed numerous petitions and therefore must demonstrate its ability to pay the proffered wages for all beneficiaries. Although the petitioner had substantial net current assets in 2008, the total proffered wages exceeded the petitioner's net current assets in 2008. In addition, as noted above, although the petitioner had contracts with healthcare facilities, those contracts are on an as-needed basis. Counsel notes that the petitioner has 40 employees. However, the petitioner filed approximately 170 Form I-140 petitions from 2007 to 2009. There is nothing in the record to establish that the additional staff would generate sufficient additional income such that the petitioner would be able to pay the proffered wages for all beneficiaries. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Counsel, in her brief, also cites *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009). Counsel states that, pursuant to the decision *Construction and Design*, "as long as the Service determines that the petitioner is rational, it should assume that the hired worker would lead to positive income, not negative." However, the decision in *Construction and Design* is not binding precedent in this case. The AAO is bound by precedent decisions of the circuit court of appeals in the circuit in which a case arises. *See N.L.R.B. v. Ashkenazy Property Management Corp.*. 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit). The instant case did not arise in the seventh circuit, and therefore *Construction and Design* is not binding.

Further, even if the decision in *Construction and Design* were binding precedent, it would not change the result in this case. The seventh circuit in *Construction and Design* actually concurred with the method used by USCIS in determining an employer's ability to pay the proffered wage and found that the petitioning employer had failed to establish that it had sufficient resources to pay the proffered wage.

Specifically, the *Construction and Design* court noted that USCIS "looks at a firm's income tax returns and balance sheet first."[4] The court went on to state that if the petitioner's tax returns do not establish its ability to pay the proffered wage the petitioner "has to prove by other evidence its ability to pay the alien's salary."[5] The court found that the employer had failed to establish that it had sufficient resources to pay the proffered wage "plus employment taxes (plus employee benefits, if any)."[6]

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[4] *Id.* at 596.
[5] *Id.*
[6] *Id.*

Similarly, in this case, the AAO has examined wages paid to the beneficiary, the petitioner's net income and net current assets, and found that the petitioner failed to establish its ability to pay the proffered wage. The AAO has also considered the "totality of the circumstances" and found that the petitioner failed to provide any other evidence that would establish its ability to pay the proffered wage. The job offer has not been established to be realistic under the circumstances.

Therefore, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Further, although not noted by the director, the record fails to establish that the beneficiary met the requirements of the ETA Form 9089 as of the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien 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. 1986). *See also*, *Mandany v. Smith*, 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). A labor certification is an integral part of this petition, but the preparation of an ETA Form 9089 does not mandate the approval of the relating petition.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the ETA Form 9089 as certified by the DOL and submitted with the instant petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

Federal circuit courts have upheld our authority to inquire as to whether the alien is qualified for the classification sought.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977).

Madany v. Smith, 696 F.2d at 1012-1013. *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).

The ETA Form 9089, Part H set forth the minimum requirements for the position of Registered Nurse. The proffered position requires an associate's degree in nursing. Part H Item 8 indicates that

no alternative combination of education and experience is acceptable. Part H Item 9 indicates that the petitioner will accept a foreign educational equivalent.

In Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is an associate's degree in nursing in 2005 from . In corroboration of the ETA Form 9089, the petitioner provided the beneficiary's Diploma in General Nursing and Midwifery and Course Completion Certificate for the course of General Nursing and Midwifery. There is no evidence in the record suggesting that the beneficiary's Diploma in General Nursing is equivalent to a U.S. associate's degree in nursing.

In determining whether the beneficiary possessed a U.S. associate's degree in nursing or a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://aacraoedge.accrao.org/ register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides a great deal of information about the educational system in India. EDGE states that a diploma in nursing, awarded upon completion of three years of study beyond the Secondary School Certificate, represents attainment of a level of education comparable to up to one year of university study in the United States. EDGE does not suggest that a three-year diploma in nursing from India may be deemed a foreign equivalent degree to a U.S. associate's degree.

In the RFE issued October 5, 2010, this office requested evidence to establish that the beneficiary possessed an associate's degree or foreign equivalent degree in nursing as of the priority date. In response, counsel states that the beneficiary's education was evaluated and found "sufficient" by the Vermont State Board of Nursing.

Although the beneficiary's education may be sufficient for purposes of licensing in the State of Vermont, the issue here is whether the beneficiary meets the educational requirements stated on the ETA Form 9089 labor certification application. There is no evidence that an associate's degree is required for licensure as a registered nurse in Vermont. Therefore, the fact that the beneficiary is licensed in Vermont is not sufficient to establish that the beneficiary possesses the equivalent of a U.S. associate's degree in nursing.

As stated above, there is no evidence in the record suggesting that the beneficiary's Diploma in General Nursing is equivalent to a U.S. associate's degree in nursing. Therefore, the petitioner has not established that the beneficiary meets the requirements stated on the ETA Form 9089. Thus, the

petitioner has failed to demonstrate that the beneficiary was qualified to perform the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.