

(b)(6)

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

Date: **MAY 30 2012** Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 (the director), 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 Japanese food 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 established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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 25, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on March 10, 2005. The proffered wage as stated on the Form ETA 750 is \$24,000 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

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.¹

On appeal, counsel submits a brief; a buyer closing statement dated September 24, 2008; a seller closing statement dated September 24, 2008; amended escrow instructions dated September 18, 2008; a Seller's Permit filed with the California State Board of Equalization dated September 1, 2008; a Fictitious Business Name Statement; bank statements for [REDACTED] from October, November and December 2008 as well as bank statements for [REDACTED] from January, February and March 2009; and bank statements for [REDACTED] from August through December 2007 and January through July 2008.

The evidence in the record of proceeding shows that the petitioner, [REDACTED] is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2004, to have a gross annual income of \$1.5 million, and currently to employ five workers. According to the tax returns in the record, the petitioner's fiscal year (FY) is from August 1 until July 31. On the Form ETA 750B, signed by the beneficiary on March 5, 2005, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel admits that the evidence in the record of proceeding did not demonstrate the petitioner's ability to pay the beneficiary the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. However, counsel asserts that the director should have considered the totality of the petitioner's circumstances because, counsel claims, 2007 is uncharacteristic when compared with the petitioner's financial situation in 2005 and 2006. Counsel also states, "the reason for the low financial figures in 2007 income tax return [sic] was mainly because the Petitioner [REDACTED] sold its business, [REDACTED] to a new buyer, [REDACTED] (the claimed successor-in-interest) in September of 2008."

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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United

¹ 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).

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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, USCIS electronic records show that the petitioner filed at least nine other I-140 petitions which have been pending during the time period relevant to the instant petition. 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. at 144-145 (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).

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, the petitioner provided a copy of IRS Form W-2 which it issued to the beneficiary in 2008. The petitioner neither claims to have employed nor provided evidence of any wages paid to the beneficiary prior to 2008. The beneficiary's IRS Form W-2 shows compensation received from the petitioner, as shown in the table below.

- In 2008, the Form W-2 stated compensation of \$11,500.00.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2005 or at any time thereafter. However, since the petitioner has demonstrated that it paid the beneficiary a portion of the proffered wage in 2008, it must only demonstrate the ability to pay the difference between the wages already paid and the full proffered wage, that difference being \$12,500 for 2008.

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 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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).

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 March 9, 2009 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 FY 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for FY 2007 is the most recent return available, that return covering the period from August 1, 2007 until July 31, 2008. The petitioner's tax returns demonstrate its net income for FY 2005, FY 2006 and FY 2007, as shown in the table below.

- The petitioner did not submit Form 1120 for FY 2004.²
- In FY 2005, the Form 1120 stated net income of \$68,004.00.
- In FY 2006, the Form 1120 stated net income of \$60,787.00.
- In FY 2007, the Form 1120 stated a net loss of \$101,761.00.

For FY 2004, the petitioner has not provided regulatory-prescribed evidence of its ability to pay. For the fiscal years 2005 and 2006, the petitioner has demonstrated sufficient net income to pay the beneficiary the proffered wage. However, according to USCIS records, the petitioner filed at least nine other I-140 petitions, two of which had priority dates in 2005.³ Therefore, the petitioner must have the ability to pay three beneficiaries for these years. Since the petitioner has not identified a wage associated with the other petitions, the AAO will assume the wage to be similar as in the instant circumstance, \$24,000 per year. Therefore, the petitioner would have required approximately \$72,000 to pay three beneficiaries in FY 2005 and FY 2006. The petitioner has not demonstrated sufficient net income to pay three beneficiaries in either FY 2005 or FY 2006.⁴ Further, the petitioner has not demonstrated sufficient net income to pay any beneficiaries in FY 2007.⁵

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end

² FY 2004 covers the period from August 1, 2004 until July 31, 2005 and should have been submitted with the I-140 petition as that timeframe covers the priority date.

³ [REDACTED] was filed on December 10, 2007 and was approved on April 20, 2009. The priority date associated with this petition is March 25, 2005. [REDACTED] was filed on January 11, 2008 and was approved on December 14, 2009. The priority date associated with this petition is March 18, 2005.

⁴ In the director's March 25, 2009 denial, he did not take into account the multiple petitions which the petitioner filed. Therefore, the director's finding that the petitioner demonstrated the ability to pay the beneficiary the proffered wage in 2005 and 2006 is withdrawn.

⁵ The petitioner paid the beneficiary \$11,500 in 2008 and has to demonstrate the ability to pay the difference between wages already paid and the full proffered wage for that year. Fiscal year 2007 covers the period from August 1, 2007 until July 31, 2008. Therefore, part of the income reported on this federal income tax return would be considered in determining whether the petitioner had sufficient net income to pay that difference. However, for FY 2007, the petitioner reported a net loss. Therefore, the petitioner has not demonstrated sufficient net income to pay the difference between the wages already paid and the proffered wage. Further, in both 2007 and 2008, the petitioner had at least nine pending petitions, five of which were approved. The petitioner has not demonstrated the ability to pay even the difference between wages already paid to the beneficiary and the full proffered wage in just the instant circumstance. The petitioner could not have paid nine beneficiaries.

⁶According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

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 FY 2005, FY 2006 and FY 2007, as shown in the table below.

- In FY 2005, the Form 1120, Schedule L stated net current assets of \$68,278.00.
- In FY 2006, the Form 1120, Schedule L stated net current liabilities of \$5,858.00.
- In FY 2007, the Form 1120, Schedule L stated net current liabilities of \$22,421.00.⁷

In FY 2005, the petitioner has demonstrated sufficient net current assets to pay one beneficiary the proffered wage. However, the petitioner has not demonstrated sufficient net current assets to pay three beneficiaries.⁸ In FY 2006 and FY 2007, the petitioner has not demonstrated sufficient net current assets to pay any beneficiaries the proffered wage. As noted earlier, the petitioner failed to provide regulatory-prescribed evidence of its ability to pay the proffered wage in FY 2004.

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

On appeal, counsel acknowledges that the petitioner's federal income tax returns do not demonstrate the ability to pay the beneficiary the proffered wage in 2007. However, counsel asserts that 2007 represented an uncharacteristic year for the petitioner due mainly to the fact that the petitioner sold its business in September 2008. Counsel, therefore, asserts that the director should have considered the totality of the petitioner's circumstances in his assessment.

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 (Reg'l Comm'r 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

of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷ In the director's March 25, 2009 denial, he erroneously identified net current assets of \$1,366 for 2007.

⁸ In the director's March 25, 2009 denial, he did not account for multiple beneficiaries, so the director's finding that the petitioner demonstrated sufficient net current assets to be able to pay the beneficiary the proffered wage in 2005 is withdrawn.

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 the instant case, at the time the petitioner filed the I-140 petition, it had been in business for only three years, having commenced operations on July 29, 2004.⁹ Gross receipts were steady, and both officer compensation and payroll remained relatively consistent and modest for the three years represented. Further, though the petitioner claims that 2007 was uncharacteristic compared with its history of profitability, the petitioner provided no evidence to demonstrate the occurrence of any uncharacteristic business expenditures or losses for any years. Though the petitioner states that it sold its business in September 2008, it has not demonstrated how this transaction represents an uncharacteristic business expenditure or loss for 2007, particularly since the sale occurred after the close of fiscal year 2007. Further, the petitioner has not demonstrated the historical growth of the business operation, the overall number of employees, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. 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.

Additionally, in an effort to demonstrate that the petitioner had sufficient funds available in 2007 to pay the beneficiary, notwithstanding the net loss and net liabilities reported on Form 1120, counsel supplied the petitioner's bank account statements from August through December 2007 and January through July 2008.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a

⁹ This date was taken from Section C of the petitioner's Form 1120, U.S. Corporation Income Tax Return.

given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was already considered above in determining the petitioner's net current assets.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on 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).

Beyond the decision of the director, the petitioner also failed to establish that [REDACTED] is a successor-in-interest to the entity that filed the petition, the labor certification and the appeal [REDACTED].¹⁰ A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If [REDACTED] is a different entity than the petitioner/labor certification employer, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor. On appeal, counsel submits the Buyer Closing Statement from [REDACTED] dated September 24, 2008; the Seller Closing Statement from [REDACTED] dated September 24, 2008; Amended Escrow Instructions from [REDACTED] dated September 18, 2008; a Seller's Permit issued by the California State Board of Equalization to [REDACTED] on September 1, 2008; and a Fictitious Business Name Statement filed by [REDACTED]. However, the claimed successor did not provide a contract or describe the terms of the sale. The evidence does not demonstrate that the job opportunity will be the same as originally offered. Further, the evidence

¹⁰ Counsel only made the claim that [REDACTED] sold its business to [REDACTED] for the first time on appeal. [REDACTED] DBA [REDACTED] filed the labor certification, Form I-140 and the appeal (Form I-290B). Along with the appeal, [REDACTED] supplied two Notices of Entry of Appearance as Attorney or Representative (Form G-28): 1) for [REDACTED] and 2) for [REDACTED] Inc.

does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Indeed, as has already been discussed above, the petitioner did not demonstrate the ability to pay the beneficiary for any of the years under consideration. Regarding the claimed successor's ability to pay, it only provided bank statements for October through December 2008 and January through March 2009 and exclusive reliance upon such statements for demonstrating the ability to pay is misplaced. *See* 8 C.F.R. § 204.5(g)(2). Accordingly, the petition must also be denied because B.C.R.K., Inc. has failed to establish that it is a successor-in-interest to the petitioner/labor certification employer.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.