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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

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Date: **MAY 15 2012** Office: TEXAS SERVICE CENTER FILE:

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,

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 Software development company. It seeks to employ the beneficiary permanently in the United States as a system analyst, O*Net-SOC job code 15-1051.00.¹ As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding 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 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 2, 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.

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

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Further, the regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

¹ O*Net-SOC job code can be accessed online at <http://www.onetonline.org> (last accessed February 13, 2011).

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).

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 ETA Form 9089 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 ETA Form 9089 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).

In the instant proceeding, the ETA Form 9089 was electronically filed for processing and accepted by the DOL on July 13, 2006.³ The rate of pay or the proffered wage specified on the ETA Form 9089 is \$42,848 per year. In the ETA Form 9089, the petitioner specifies that all job applicants, including the beneficiary, in order to qualify for the position should have at least a bachelor's degree in Computer Science or Engineering or a related field and a minimum of 24 months (two years) of work experience in the job offered or in an alternate occupation.

To show that the petitioner has the continuing ability to pay \$42,848 per year from July 13, 2006, the petitioner submitted the following evidence:

- Copies of Forms 1120S, U.S. Corporation Income Tax Return for an S Corporation, for the years 2002 through 2007;⁴
- A copy of the beneficiary's Form W-2 for 2006-2008;
- A Cash Flow Statement as of December 31, 2008;
- An Income and Expenditure Statement for the period January 1, 2008 to April 30, 2008;

³ The AAO notes that the DOL accepted and certified the ETA Form 9089 filed on behalf of an alien beneficiary named [REDACTED]. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the petition was filed on July 2, 2007 predating the final rule, and since [REDACTED] has not been issued lawful permanent residence based on the labor certification herein submitted, the requested substitution is permitted.

⁴ The petitioner's tax returns for the years 2002 through 2004 are not legible. The AAO will not specifically consider the petitioner's tax return for the year 2005 since the petitioner is only required to demonstrate the ability to pay the proffered wage from July 13, 2006.

- Bank statements issued between January 1, 2008 and May 31, 2008;
- A copy of Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2008; and
- Various articles about the petitioner.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation, incorporated on January 30, 1998. On the petition, the petitioner claimed to have been established in 1998, to currently employ 40 people, and to have gross annual income and net annual income of \$3,383,213 and (\$704,599), respectively.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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, 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.

Based on the evidence submitted, the beneficiary received the following compensation from the petitioner between 2006 and 2008:

<i>Tax Year</i>	<i>Actual wage (AW) (Box 1, W-2)</i>	<i>Yearly Proffered Wage (PW)</i>	<i>AW minus PW</i>
2006	\$25,048.66	\$42,848	(\$17,799.34)
2007	\$36,550.92	\$42,848	(\$6,297.08)
2008	\$44,084.06	\$42,848	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 show that it has the ability to pay \$17,799.34 in 2006⁵ and \$6,297.08 in 2007. The petitioner can pay these amounts through either its net income or net current assets.

If the petitioner chooses to use its net income to pay the proffered wage during that period, 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), *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 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 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

⁵ The director concluded that the petitioner established the ability to pay in 2006 based on the beneficiary's prorated wage. We do not prorate the beneficiary's wage in this case because the record contains no evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs.

for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the AAO closed on March 31, 2009 when the petitioner submitted its appeal to the AAO. As of that date, the petitioner’s 2008 federal income tax return was not yet available. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income (loss) for the year 2007, as shown below:

<i>Tax Year</i>	<i>Net Income (Loss)⁶ – in \$</i>	<i>The Remainder of the PW – in \$</i>
2006	(101,895)	17,799.34
2007	(611,721)	6,297.08

Therefore, the petitioner did not have sufficient net income to pay the beneficiary’s proffered wage in either 2006 or 2007.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁷ A corporation’s year-end current assets are

⁶ For an S Corporation, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S if the S corporation’s income is exclusively from a trade or business. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-prior/i1120s--2007.pdf> (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In the instant case, the net income in 2007 is found on line 21.

⁷ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable

shown on Schedule L, lines 1 through 6. 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 the years 2006 and 2007, as shown below:

<i>Tax Year</i>	<i>Net Current Assets – in \$</i>	<i>The Remainder of the PW – in \$</i>
2006	(251,987)	17,799.34
2007	(1,272,528)	6,297.08

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in either 2006 or 2007. Based on the net income and net current asset analysis above, the AAO agrees with the director that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence.

On appeal, the petitioner submits various financial statements, i.e. a cash flow statement and income and expenditure statement, and bank statements to demonstrate the ability to pay.

The AAO observes that none of the financial statements submitted is audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements *must* be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. An unaudited financial statement consists of the unsupported assertions of management and is therefore, not reliable. Therefore, the AAO declines to accept the financial statement submitted above as evidence of the petitioner's ability to pay.

Similarly, the AAO will not accept the bank statements as evidence of the petitioner's ability to pay. The petitioner's reliance on the balances in its bank accounts 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 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),

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.

such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

On appeal, counsel for the petitioner argues that the reasons for the company's inability to demonstrate the ability to pay in 2006 and 2007 are due to the company's large investments in Research and Development (R&D) and in advertising. Counsel also urges the AAO to consider the petitioner's net current assets between 2002 and 2005.⁸

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. 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.

We acknowledge that the petitioner is an ongoing business. The various articles about the petitioner and its products also show that the petitioner generally has a good reputation among software development companies. However, merely stating that certain years are unusual compare to other years due to large investments and advertising do not establish the reliability of the assertion. 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)). Additionally, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The tax records submitted do not reflect the occurrence of an uncharacteristic

⁸ Counsel states that the petitioner's net current assets are as follows: \$215,727 in 2002; \$750,971 in 2003; \$669,583 in 2004; and \$432,023 in 2005.

business expenditure or loss that would explain the petitioner's inability to pay the proffered wage, particularly in 2006 and 2007.

Additionally, the copies of the federal tax returns for the years 2002 through 2004 are not legible. We cannot verify the numbers (amounts of the net current assets) that counsel has claimed on appeal.

Beyond the decision of the director, the AAO finds that the beneficiary does not qualify for the position.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. To determine whether a beneficiary is eligible for a preference immigrant visa, 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. 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).

Here, as previously noted, the ETA Form 9089 was electronically filed and accepted for processing by the DOL on July 13, 2006. The name of the job title or the position for which the petitioner seeks to hire is "System Analyst."

Further, the petitioner set the following requirements under Part H:

4. Education: Minimum level required: Bachelor's
- 4-B. Major Field Study: Computer Science or Engineering or Related
5. Is training required in the job opportunity? No
6. Is experience in the job offered required for the job? Yes
- 6-A. If Yes, number of months experience required: 24
7. Is there an alternate field of study that is acceptable? No
8. Is there an alternate combination of education and experience that is acceptable? No
9. Is a foreign educational equivalent acceptable? Yes
10. Is experience in an alternate occupation acceptable? Yes
- 10-A. If Yes, number of months experience in alternate occupation required: 24
- 10-B. Identify the job title of the acceptable alternate occupation: Project Co-Ordinator, Jr. Processing Officer, Sr. Project Executive

To demonstrate that the beneficiary has a bachelor's degree in either computer science or engineering, the petitioner submits:

- A copy of the beneficiary's diploma showing that the beneficiary has a Bachelor of Engineering degree from Mumbai University;
- A copy of the Education Evaluation Report prepared by International Education Evaluations, Inc. stating that the beneficiary's degree is equivalent to a U.S. bachelor's degree; and
- Copies of various certificates granted to the beneficiary.

The AAO acknowledges that the beneficiary's Bachelor of Engineering degree from Mumbai University is comparable to a bachelor's degree in the United States.⁹

The record, however, contains no evidence that the beneficiary has a minimum of 24 months (two years) of work experience in the job offered or in the alternate occupation as of the priority date. Under Part K, Alien Work Experience, the beneficiary listed the following work experience:

Employer Name	Job Title	Start date	End date
	Computer System Analyst	01/23/2005	Present
	System Analyst-E-Business Specialist	08/2003	08/2004
	Network Engineer/Administrator	01/2003	05/2003

The AAO notes that the beneficiary's professional work experience from May 2003 to August 2004 does not equal to 24 months.¹⁰ Additionally, the record contains no evidence that the beneficiary worked for either the CNB Computers, Inc. or the City of Vaughan.¹¹

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

⁹ We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) (<http://www.aacrao.org>). We consider information from the AACRAO website to be reliable. According to AACRAO EDGE, Bachelor of Engineering from a university in India represents attainment of a level of education comparable to a U.S. bachelor's degree.

¹⁰ The AAO cannot consider the beneficiary's work experience with the petitioner [REDACTED]. The experience gained with the petitioner was in the position offered, and it is substantially comparable to the job for which the certification was sought. The beneficiary, therefore, cannot rely on his experience that he gained with the petitioner to qualify for the proffered position. See 20 C.F.R. § 656.17(i) *Actual Minimum Requirements*.

¹¹ The AAO notes that the beneficiary listed on his Form G-325 (Biographic Information) which he filed along with the Form I-485 (Application to Register Permanent Residence or Adjust Status) an employment with [REDACTED] as Network Support from May 2000 to September 2002. This employment will not be considered since it was not listed under Part K of the ETA Form 9089, and the petitioner has not submitted proof of such employment.

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.

Therefore, the AAO finds that the beneficiary is not qualified to perform the duties of the position.

The appeal will be dismissed 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.