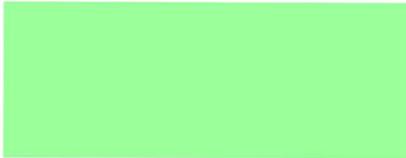




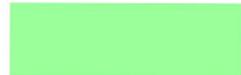
U.S. Citizenship  
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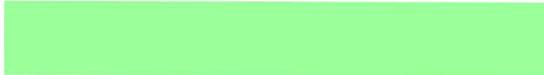


DATE JUN 03 2013 OFFICE: TEXAS SERVICE CENTER

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:

SELF-REPRESENTED

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 in accordance with the instructions on 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the director of the Texas Service Center (director). The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter was appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a gas station/convenience store.<sup>1</sup> It seeks to permanently employ the beneficiary in the United States as a night shift convenience store manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The petition is accompanied by a labor certification approved by the U.S. Department of Labor (DOL).

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The director’s NOIR sufficiently detailed several indicators of fraud, including that the beneficiary signed another individual’s name on the Form I-140, that the beneficiary’s relationship to the petitioner invalidated a bona fide job offer and that the beneficiary’s status may have prevented him from being a shareholder of an S corporation, that would warrant a denial if unexplained and un rebutted. Thus, the NOIR was properly issued for good and sufficient cause.

As set forth in the October 20, 2009 NOR, the director stated that the petitioner had not responded to the NOIR and stated, in part:

It was determined that the petition was approved in error as it was determined that fraud was committed. It was determined that the beneficiary of the petition signed the I-140 himself. The signatures on the I-140 and the I-485 were analyzed and it seems that both signatures are that of the beneficiary. It has been determined that the beneficiary is himself the majority owner and any legitimate attempts to find a qualified US worker would not have been conducted as it is doubtful the position would have been given to anyone but the [beneficiary] himself. As the beneficiary is

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<sup>1</sup> It is noted that an attorney who is currently on the list of suspended and expelled practitioners and disbarred by the State of Georgia represents the petitioner.

the majority owner, it is highly doubtful that he would have competed with qualified U.S. workers. It was determined that the address of [REDACTED] is the address of [REDACTED] who is the registered agent and board member of the petitioning entity, [REDACTED]. This address is associated with at least 25-40 other questionable businesses. Non-residents are not permitted to own shares of a company that files IRS Form 1120S. As the beneficiary is a non-resident, and is the majority owner of the petitioning entity, the petitioner would not have been eligible to file the IRS Form 1120S.

The director revoked the petition's approval accordingly.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

On appeal, the petitioner asserts that it timely replied to the director's NOIR. The petitioner submits a copy of a FedEx shipping label and a printout from www.fedex.com showing that a package related to [REDACTED] was delivered to the Texas Service Center on September 1, 2009. The petitioner also submits on appeal a reply to the NOIR that it asserts was included in the FedEx package. However, it is not clear that the FedEx package sent to the Texas Service Center contained a timely response to the NOIR relating to the petitioner, [REDACTED]. Thus, the petitioner has not established that it timely responded to the NOIR. The director's decision revoking the approval of the petition will be sustained, and the appeal will be dismissed.

However, even if the AAO accepts that the petitioner timely responded to the NOIR, the director's decision revoking the petition's approval will be sustained and the appeal will be dismissed.

### **Signature on Form I-140**

The Form I-140 petition identifies [REDACTED] as the employer and the petitioner. At Part 8 of the I-140 in the block provided for "Petitioner's Signature," [REDACTED] purportedly signed the Form I-140 on June 24, 2003 on behalf of the petitioner. However, the beneficiary actually signed the name "Bharti Patel" on the Form I-140 visa petition, thereby seeking to file the petition on behalf of the actual United States employer. In response to the NOIR, the petitioner submits an affidavit from [REDACTED] stating that she authorized the beneficiary to sign the Form I-140 on her behalf.<sup>3</sup> However, the regulations do not permit any individual who is not the petitioner to sign Form I-140 on behalf of a United States employer.

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

<sup>3</sup> The record indicates that [REDACTED] is the beneficiary's sister-in-law. [REDACTED] sister, [REDACTED] married the beneficiary on October 7, 2002.

The regulation at 8 C.F.R. § 204.5(c) provides:

*Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act. An alien, or any person in the alien's behalf, may file a petition for classification under section 203(b)(1)(A) or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act).

The regulation at 8 C.F.R. § 204.5(a)(1) provides that a petition is properly filed if it is accepted for processing under the provisions of 8 C.F.R. § 103. The regulation at 8 C.F.R. § 103.2(a)(2) provides:

*Signature.* An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with the [USCIS] is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

There is no regulatory provision that waives the signature requirement for a petitioning U.S. employer or that permits a petitioning U.S. employer to designate the beneficiary to sign the petition on behalf of the U.S. employer. The petition has not been properly filed because the petitioning U.S. employer, [REDACTED] did not sign the petition. Pursuant to 8 C.F.R. § 103.2(a)(7)(i), an application or petition which is not properly signed shall be rejected as improperly filed, and no receipt date can be assigned to an improperly filed petition. While the Service Center did not reject the petition, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 at \*3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

The signature requirement reflects a genuine Form I-140 program concern regarding the validity of the permanent job offers contained in Form I-140 petitions. To this end, the signature line on the Form I-140 for the petitioner provides that the petitioner is certifying, “under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it are all true and correct.” To be valid, 28 U.S.C. § 1746 requires that declarations be “subscribed” by the declarant “as true under penalty of perjury.” *Id.* In pertinent part, 18 U.S.C. § 1621, which governs liability for perjury under federal law, mandates that: “Whoever in any declaration under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true is guilty of perjury.” 18 U.S.C. § 1621.

The probative force of a declaration subscribed under penalty of perjury derives from the signature of the declarant; one may not sign a declaration “for” another. Without the petitioner’s actual

signature as declarant, the declaration is completely robbed of any evidentiary force. *See In re Rivera*, 342 B.R. 435, 459 (D. N.J. 2006); *Blumberg v. Gates*, No. CV 00-05607, 2003 WL 22002739 (C.D.Cal.) (not selected for publication).

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition on this basis.

### **Beneficiary's Ownership Interest in the Petitioner**

In response to the NOIR, the petitioner states that during the recruitment period in 2000-2001, the beneficiary had a 45% shareholder interest in the petitioner.<sup>4</sup> The petitioner asserts that the beneficiary was not a majority owner of the petitioner and was not in charge in hiring, firing and overall management of the petitioner's business. Instead, the petitioner submits an affidavit from [REDACTED] in which she asserts that she was responsible for hiring, firing and overall management of the petitioner's business from 1999 to 2002. In response to the NOIR, the petitioner also submits an affidavit from [REDACTED] dated August 31, 2009. The affidavit states that [REDACTED] was employed by the petitioner and that [REDACTED] interviewed, hired and managed [REDACTED] and was the immediate supervisor of [REDACTED] during his/her 8 month employment with the petitioner in 2000.

However, on the beneficiary's Form G-325 contained in the record, he asserts that he was the manager of the petitioner from October 2000 to the date he signed the Form G-325 on June 26, 2003. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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).

It is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time

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<sup>4</sup> According to the Georgia Secretary of State, the beneficiary was also the Secretary of the petitioner when the labor certification was filed, and he was one of two initial members of the Board of Directors of the petitioner when it was incorporated. *See* <https://cgov.sos.state.ga.us/DocumentDisplay.aspx?docId=3052343> (accessed May 24, 2013).

of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to United States Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

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). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>5</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).<sup>6</sup> In this case, the petitioner has failed to demonstrate that the certified job opportunity was "clearly open to any qualified U.S. worker" as

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<sup>5</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

<sup>6</sup> The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

attested on Item 22-h of Part A of the Form ETA 750, because the beneficiary had a substantial ownership interest in the petitioning business, and it did not disclose that relationship to DOL during the labor certification process.<sup>7</sup> Further, the beneficiary was a member of the petitioner's Board of Directors when the petitioner was incorporated, and he was its Secretary when the petition was filed. His sister-in-law, [REDACTED] claims to have been a manager of the petitioner in charge of hiring, firing and overall management of the petitioner's business, and she owned 25% of the shares of stock of the petitioner. While the petitioner asserts that it filed its 2001 and 2002 tax returns with the Form I-140 and that those tax returns disclosed the beneficiary's interest in the petitioner, it has not been established that those tax returns were submitted to DOL. The petitioner submitted no evidence establishing that it disclosed the relationship between the beneficiary and the petitioner to DOL.

A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may be "financial, by marriage, or through friendship." *See Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000). Under 20 C.F.R. 626.20(c)(8) and 656.3, the

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The INS, [now USCIS] therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

<sup>7</sup> Although not binding on USCIS, the Board of Alien Labor Certification Appeals (BALCA) in *Matter of Modular Container Systems, Inc.*, 89 INA 228 (July 16, 1991), determined that a *bona fide* job opportunity was dependent on whether U.S. workers could legitimately compete for the job opening and whether a genuine need for alien labor existed. If the certified job opportunity is tantamount to self-employment, then there is a per se bar to labor certification. Whether the job is clearly open to U.S. workers is measured by such factors as 1) whether the alien was in a position to influence or control hiring decisions regarding the job for which certification is sought; 2) whether the alien was related to the corporate directors, officers, or employees; 3) whether the alien was the incorporator or founder of the employer; 4) whether the alien had an ownership interest in the company; 5) whether the alien was involved in the management of the company; 6) whether he was one of a small number of employees; 7) whether the alien has qualifications for the job that are identical to specialized or unusual job duties and requirements as stated in the application; and 8) whether the alien is so inseparable from the petitioning employer because of a pervasive presence and personal attributes that the employer would be unlikely to continue in operation without him. Based on these factors, the job was clearly not open to U.S. workers. The beneficiary was: 1) in a natural influence to control hiring since he was the manager of a small convenience store; 2) he was a 45% shareholder; 3) he was an initial director of the petitioning business and was an officer of the petitioner; 4) he was one of a small number of employees of the petitioner; and 5) he is so inseparable from the petitioner because of a pervasive presence and personal attributes that the employer would be unlikely to continue in operation without him. The petitioner has failed to establish that a *bona fide* job offer exists.

petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The court noted:

The regulatory scheme challenged by [REDACTED] is reasonable related to the achievement of the purpose outlined in section 212(a). As the district court correctly noted, “the DOL certification process is built around a central administrative mechanism: A private good faith search by the certification applicant for U.S. workers qualified to take the job at issue.” *See* 20 C.F.R. § 656.21. This “good faith search” process operates successfully because all employers are subject to uniform certification requirements. The two independent safeguards challenged by [REDACTED] the ban on alien self-employment and the *bona fide* job requirements—make the good faith search process self-enforcing. The prophylactic rules permit the Department of Labor to process more than 50,000 permanent labor certification requests each years. . .

The challenged regulations also represent a reasonable construction of section 212(a) insofar as they ensure the integrity of the information gathered by DOL. As a practical matter, where an employer is indistinguishable from the alien seeking the job in question, there is reason for the employer to abuse the process. . .

*Bulk Farms, Inc., v. Martin*, 963 F.2d 1286-1289 (1992).

The AAO finds that the petitioner failed to demonstrate that a *bona fide* job offer existed based on the undisclosed relationship of the beneficiary to the petitioner. In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition on this basis.

### **Address of the Petitioner**

The NOR stated that the address located at [REDACTED] is the address of [REDACTED] who is the registered agent and board member of the petitioning entity, [REDACTED]. The director noted that the address is associated with at least 25-40 other questionable businesses. In its response to the NOIR, the petitioner states that [REDACTED] is an investor in gas stations and convenience stores, that he has a right to provide his home address as registered agent or board member of the companies in which he has an interest, and that it was not clear how the businesses were questionable. The petitioner also submits the 2001-2004 individual tax returns of [REDACTED] to support its assertion that [REDACTED] is an investor in gas stations and convenience stores and reports his ownership interest in those companies to the Internal Revenue Service.

The AAO agrees that the director's NOIR did not sufficiently explain how the businesses were "questionable." The director did not have good and sufficient cause to revoke the petition's approval on this basis.

### **Non-resident Shareholders of S Corporations**

The director stated in his NOR that non-residents are not permitted to own shares of a company that files IRS Form 1120S.<sup>8</sup> The director further stated that since the beneficiary is a non-resident, and is the majority owner of the petitioning entity, the petitioner would not have been eligible to file the IRS Form 1120S. In its response to the NOIR, the petitioner states that the definition of non-resident alien according to USCIS is different than the definition according to the IRS. The petitioner states that according to the IRS, an alien may become a resident alien by passing either the green card test or the substantial presence test. The petitioner asserts that the beneficiary qualifies as resident alien for tax purposes because he was residing in the United States from the date of his entry in 1997 until the present. Thus, the petitioner asserts that the beneficiary qualifies as a resident alien and is eligible to be an S corporation shareholder.

The IRS provides the following guidance regarding the substantial presence test:

You will be considered a U.S. resident for tax purposes if you meet the substantial presence test for the calendar year. To meet this test, you must be physically present in the United States on at least:

1. 31 days during the current year, and
2. 183 days during the 3-year period that includes the current year and the 2 years immediately before that, counting:
  - All the days you were present in the current year, and
  - 1/3 of the days you were present in the first year before the current year, and
  - 1/6 of the days you were present in the second year before the current year.

You are treated as present in the United States on any day you are physically present in the country, at any time during the day. However, there are exceptions to this rule. Do not count the following as days of presence in the United States for the substantial presence test.

- Days you commute to work in the United States from a residence in Canada or Mexico, if you regularly commute from Canada or Mexico.
- Days you are in the United States for less than 24 hours, when you are in transit between two places outside the United States.
- Days you are in the United States as a crew member of a foreign vessel.

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<sup>8</sup> Section 1361(b) of the Internal Revenue Code defines a small business corporation as a domestic corporation which is not an ineligible corporation and which does not have more than 100 shareholders, have as a shareholder a person who is not an individual (with certain exceptions), have a nonresident alien as a shareholder, and have more than 1 class of stock.

- Days you are unable to leave the United States because of a medical condition that develops while you are in the United States.
- Days you are an exempt individual.

Do not count days for which you are an exempt individual. The term "exempt individual" does not refer to someone exempt from U.S. tax, but to anyone in the following categories who is exempt from counting days of presence in the U.S.:

- An individual temporarily present in the United States as a foreign government-related individual
- A teacher or trainee temporarily present in the United States under a "J " or "Q " visa, who substantially complies with the requirements of the visa
- A student temporarily present in the United States under an "F, " "J, " "M, " or "Q " visa, who substantially complies with the requirements of the visa
- A professional athlete temporarily in the United States to compete in a charitable sports event

Even if you passed the substantial presence test you can still be treated as a nonresident alien if you qualify for one of the following exceptions;

1. The closer connection exception available to all aliens.
2. The closer connection exception available only to students.

See <http://www.irs.gov/Individuals/International-Taxpayers/Substantial-Presence-Test> (accessed May 24, 2013).

Even if the AAO accepts that the beneficiary was physically present in the United States from the date of his entry in 1997 until the present, the petitioner did not provide evidence to establish that the beneficiary was not an exempt individual and did not qualify for either of the closer connection exceptions listed above. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, the record does not establish that beneficiary is eligible to be a shareholder of an S corporation and, therefore, that the petitioner was eligible to file IRS Form 1120S.

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition on this basis.

In sum, the petitioner did not establish that it timely replied to the director's NOIR. However, even if the AAO accepts that the petitioner timely responded to the NOIR, the director revoked the petition's approval for good and sufficient cause. The director's decision revoking the approval of the petition will be sustained, and the appeal will be dismissed.

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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.