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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B7

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 0 2 2009
WAC 06 144 50734

IN RE: Petitioner: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds. On appeal, the petitioner submits a statement and additional evidence. For the reasons discussed below, we uphold the director's bases of denial. Moreover, as will be discussed below, the petitioner's business plan for creating the necessary employment is not credible.

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, [redacted], located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $500,000. The petitioner indicated that [redacted]. would be operating a hotel.

INVESTMENT OF CAPITAL

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
>
> * * *
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien

> entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
>
> > (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
> >
> > (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
> >
> > (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
> >
> > (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
> >
> > (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

On the Form I-526 petition, the petitioner indicated that he had made an initial investment of $538,000 on January 17, 2001 and had invested a total of $2,200,000. The only evidence of any transfer of funds prior to 2003 is a $46,860 wire transfer from the petitioner's account at the National Westminster Bank (NWB) in London to the petitioner's account at Wells Fargo Bank, account number [redacted]. The petitioner also transferred another $33,000 from his NWB account to his

Wells Fargo Bank account, but the wire transfer application documenting this transfer is undated. Throughout the proceedings, the petitioner has submitted evidence of the following transfers to Union Bank of California account

Date:	Amount:	Source:	Evidence:
March 19, 2003	$65,083.20	Petitioner's NWB account	Wire Transfer Receipt
July 31, 2003	$208,382	Petitioner's NWB account	Wire Transfer Receipt
August 18, 2003	$55,000	Unknown Remitter	Preferred Bank Cashier's Check
August 27, 2003	$30,000		California National Bank Cashier's Check
August 27, 2003	$15,000	el	Check
August 29, 2003[1]	$62,750	Petitioner's NWB account	Wire Transfer Receipt
Total:	$436,215.20		

In response to the director's request for additional evidence, the petitioner asserted that the $55,000, $30,000 and $15,000 that cannot be traced back to the petitioner originate from "the previous partnership as part of the petitioner's benefits." The petitioner also claimed to have submitted a "Bank statement showing the deposit of $400,000.00 to the business account, from the previous enterprises as the beneficiary's shares dated Sept 2005." The petitioner, however, did not submit s September 2005 bank statement. Rather, he submitted his own Union Bank of California statements covering September 2005. Not only do these statements not reflect a $400,000 deposit, they reflect the deposits originating from s account at the same bank: $1,000 on August 22, 2005, $15,000 on September 16, 2005 and $10,000 on September 23, 2005. Moreover, the petitioner did not explain the nature of "the previous partnership" or the "previous enterprises" he asserts are transferring investments on his behalf. Finally, the petitioner also submitted evidence that transferred $100,000 on September 3, 2003 and $349,866.75 on September 4, 2003 to

In addition to the above transactional evidence, the petitioner submitted documentation relating to the purchase by of the hotel it is now operating. On September 11, 2003, purchased property for $1,305,000. The closing statement shows that deposited $35,000, $100,000 and $349,866 prior to closing. financed the remaining $825,000.

[1] In response to the director's request for additional evidence, the petitioner indicated that he had transferred an additional $62,788 from his NWB account to account on the same date. The record contains a wire transfer application for £42,000 and a debit notice from NWB for £40,046, amounting to $62,788 to be sent to s account, both dated August 29, 2003. The record, however, contains August 2003 bank statement, which only documents one wire transfer deposit on August 29, 2003, a deposit of $62,750. (The statement also lists what appears to be an unrelated "office deposit" of $45,000 on August 29, 2003.) Thus, petitioner has not established that the $62,788 debited from his NWB account represents a second transfer in addition to the transfer of $62,750 deposited in s account, which appears to have been discounted for wire transfer fees.

In response to the director's first request for additional evidence, the petitioner submitted evidence that the $35,000 and the $100,000 were borrowed from and . is listed as the borrower for the $100,000 and the loan is secured by a short form Deed of Trust and Assignment of Rents. The petitioner is listed as a personal guarantor for this loan. The $35,000 promissory note indicates only that it is subject to a personal guaranty. Two individuals other than the petitioner signed the note as the guarantors. The petitioner also submitted a Note Secured by Deed of Trust whereby borrowed $825,000 from the st. On appeal, the petitioner submits evidence that he also personally guarantied this loan.

Finally, the petitioner submitted 2003, 2004 and 2005 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns. All of the returns, Schedules L, reflect common stock of $2,500. In 2003, additional paid-in-capital increased from $0 to $452,117. In subsequent years, however, the additional paid-in-capital decreased, to $392,423 in 2004 and $339,669 in 2005. As noted above, transferred $26,000 to the petitioner in August and September 2005.

The director acknowledged the transfer of a total of $336,215.20 from the petitioner to TRD in 2003. The director noted, however, that the record did not establish the source of the $55,000 and $30,000 transfers. The director expressed concern that the record did not document the deposit of the $15,000 check. Finally, the director noted that the Schedules L reflected that the petitioner had withdrawn some of his initial investment.

On appeal, the petitioner asserts that the $55,000 and $30,000 "originated from the previous sale of shares in the business [in which the petitioner] was a partner before opening up his independent enterprise." The petitioner asserts that l were the partners at that time, and these funds are part of the capital from the respondent to the enterprise." The $15,000 check was from and s account at Washington Mutual Bank. The $55,000 was from Preferred Bank, remitter unknown. The $30,000 originated from California National Bank, with the remitter identified as "r." It is not clear whether the " " mentioned by the petitioner is Regardless, the petitioner does not identify the business in which " " and were partners or submit documentation of their ownership in a partnership. The petitioner also fails to submit evidence of an agreement whereby ' or ' ' purchased his shares in another business. In fact, the record lacks evidence that the petitioner had any previous business ownership interest.

Regarding the funds transferred from overseas to the petitioner's own account, he asserts that did not have its own account at that time, but that the funds were capital. The record, however, does not trace the funds from the petitioner's U.S. account to s account or in satisfaction of expenses.

In light of the above, the petitioner has only traced $336,215.20 from his own account t

Regarding the borrowed funds, we acknowledge that the petitioner personally guarantied the loan from the $ and the That said, the loans were primarily secured by assets. None of the indebtedness can be secured by the new commercial enterprise's assets if the

indebtedness is to qualify as the petitioner's investment. 8 C.F.R. § 204.6(e) (definition of capital). A personal guaranty cannot overcome the fact that the loan is primarily secured by the assets of the new commercial enterprise. *See Matter of Soffici,* 22 I&N Dec. 158, 163 (Commr. 1998). In response to the director's request for additional evidence, the petitioner asserted that $320,000 in payments had been made. On appeal, the petitioner asserts that the payments on the notes were made from the profits of the business. Without evidence that the petitioner paid the monthly payments on the notes from his personal funds, we cannot conclude that those payments constitute his personal investment. The corporation's payment of its own expenses, including payments on a mortgage or other loan, out of its own proceeds cannot be considered an infusion of capital by the petitioner.

Finally, the petitioner does not respond to the director's concern that the Schedules L reflect that the petitioner has not maintained his investment.

In light of the above, the petitioner has not established that he had made and maintained an investment of at least $500,000.

On appeal, the petitioner claims that he is in the process of increasing his capital "from $384,866.75 to $500,000 in cash" through the sale of his house in England. As quoted above, the regulation at 8 C.F.R. § 204.6(j)(2) provides that evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. The record contains no evidence that any extra capital had been fully committed to the new commercial enterprise as of the date of filing or that, even at this date, the petitioner has entered into an agreement for the use of these funds.

In light of the above, the petitioner has not established that he has made a qualifying investment.

SOURCE OF FUNDS

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
>
> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing

jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm. 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998). Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

The initial submission included a 1998 letter addressed to the petitioner and his wife from [redacted] at [redacted]s advising that the balance due from the sale of his property and business was £78,033.33. On June 22, 2006, the director requested evidence tracing the path of funds and tax returns predating the petitioner's investment.

In response, the petitioner submitted a February 2003 letter from [redacted] advising that [redacted] had negotiated a sale of the petitioner's property for £153,000 and a May 2003 letter from [redacted] inquiring as to whether the purchase price for certain property could be "split" as follows: £150,000 for the property and £5,000 for fixtures and fittings. The petitioner also resubmitted the 1998 letter from [redacted]

On September 11, 2006, the director acknowledged the evidence submitted and again requested evidence tracing the path of the funds and tax returns predating the petitioner's investment. In response, the petitioner advised that he was unable to obtain documentation older than five years from England.

The director concluded that the letters from [redacted] were not supported by documentation of the petitioner's ownership of property or the transfer of ownership.

On appeal, the petitioner submitted documentation regarding the petitioner's purchase of in Friar Park for £32,500 ($51,821.20)[2] in 1995; a Statement of Balance for his sale of at in Birmingham for £78,033.33 ($128,895)[3] on November 30, 1998; documents relating to the petitioner's purchase of in Wednesbury for £102,748.89 ($166,052)[4] on August 6, 1999 and a Statement of Balance for the sale of property, fixture and fittings at in Wednesbury for £124,537.04 ($201,389)[5] on July 25, 2003. The petitioner also submitted British tax documentation for himself and his wife for 1988, 1990, 1995, 1999 and 2000. The petitioner's wife shows earnings of £7,807 in 1990 and £7,936 in 2000. The petitioner shows earnings of £4,588.98 in 1988, £13,689.45 in 1995, £2,770 in 1999 and £11,821 in 2000.

The petitioner received $128,895 in November 1998 for the sale of . Significantly, however, the petitioner purchased in 1999. The petitioner has not demonstrated that any funds from the sale of remained to invest in after the petitioner's purchase of The petitioner received an additional $201,389 for the sale of in July 2003. These funds postdate the petitioner's transfer of $65,083.20 on March 19, 2003, but can account for most of the $208,382 transferred to on July 31, 2003. As stated above, however, the petitioner has not adequately demonstrated the source of the funds transferred by cashier's check issued by the California National Bank and Preferred Bank or the funds transferred from and

In light of the above, while the petitioner has provided more evidence documenting his sale of property, the petitioner has not adequately documented the source of all of the invested funds.

EMPLOYMENT CREATION

The regulation at 8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
>
> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

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[2] The petitioner did not submit evidence of the exchange rates for any date. We calculated the U.S. dollar amount using the exchange rate for July 21, 1995 available at www.oanda.com (accessed November 10, 2008 and incorporated into the record of proceedings).

[3] Per the exchange rate for November 30, 1998 according to www.oanda.com (accessed November 10, 2008 and incorporated into the record of proceedings).

[4] Per the exchange rate for August 6, 1999 according to www.oanda.com (accessed November 10, 2008 and incorporated into the record of proceedings).

[5] Per the exchange rate for July 25, 2003 according to www.oanda.com (accessed November 10, 2008 and incorporated into the record of proceedings).

> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part:

> *Employee* means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.
>
> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

> Full-Time Employment Defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1039 (finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit Citizenship and Immigration Services (CIS) to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho,* 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

The petitioner indicated on the Form I-526 that there were four employees when he began his investment and that there are seven employees currently. He further indicated that he had created all seven and that he would create an additional 12 jobs.

The petitioner initially submitted one 2005 IRS Form W-2 Wage and Tax Statement issued to R- M- and IRS Forms 1099-Misc issued to and reflecting nonemployee compensation.[6] IRS Form 1120 tax returns reflect no cost of labor (Schedule A, line 3) and the following wages: $4,883 paid in 2003, $15,750 (plus $9,990 in officer compensation paid to the petitioner) in 2004 and $14,707 (plus $15,000 in officer compensation) in 2005.

On June 22, 2006, the director requested evidence of employment for all employees for the last four quarters, including quarterly reports. The director also requested evidence that hired employees were qualifying as defined at 8 C.F.R. § 204.6(e). Finally, the director requested a business plan that complied with the requirements set forth in *Matter of Ho,* 22 I&N Dec. at 213, quoted above and in the director's notice.

In response, the petitioner submitted identification for two individuals with no evidence that either individual works for , 2004 IRS Forms W-2 for and , the 2005 IRS Form W-2 and Forms 1099 submitted initially and the Permanent Resident Card for . The petitioner failed to submit federal or state quarterly returns (Forms 941 and Forms DE-6) as requested.

On September 11, 2006, the director once again requested a business plan. In response, the petitioner submitted a business plan for The director did not raise this issue in the final decision.

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[6] The record also contains IRS Forms 1099-INT, but these forms document interest paid on the loans discussed above to the and the

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The plan projects an expansion by mid-2007, requiring at least nine extra positions, bringing the total number of employees to 15. The plan further projects a need for a total of 20 employees by the end of 2007. On page 11, the plan lists the current employees as including a Chief Executive Officer, a Vice President, three housekeeping staff, two maintenance staff and one security guard. The plan proposes to hire by mid-2007 one marketing manager, one chef, one tour guide, two additional housekeeping staff and four "others" to help "serving the guests, and we shall have two shifts."

The petitioner indicated on the Form I-526 that he had purchased an existing business. Thus, the petitioner must demonstrate the creation of at least 10 new jobs beyond those that already existed at the hotel purchased. The petitioner indicated there were four employees at the time of his investment. The record does not include any quarterly returns from the seller or the sales contract confirming the seller's number of employees at the time of the sale.

Assuming the hotel did employ four employees, the petitioner must demonstrate the creation of at least ten new jobs. Thus, the petitioner must demonstrate that the hotel will employ at least 14 employees. While the petitioner indicated that employed seven workers at the time the petition was filed in April 2006, the petitioner did not submit payroll records or quarterly returns supporting that 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 (Commr. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Regl. Commr. 1972)). The petitioner only submitted IRS Forms W-2 for two employees in 2004 and one in 2005. As noted above, the Forms 1099-MISC verify nonemployee compensation. Independent contractors are explicitly excluded from the definition of "employee" set forth at 204.6(e), quoted above.

The record includes no evidence, such as payroll records or quarterly returns, corroborating the claim in the business plan that already employs eight employees. The petitioner did not submit construction or other contracts whereby would expand the hotel. Thus, the projection in the business plan that would employ 15 employees by mid-2007 is not credible.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

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.