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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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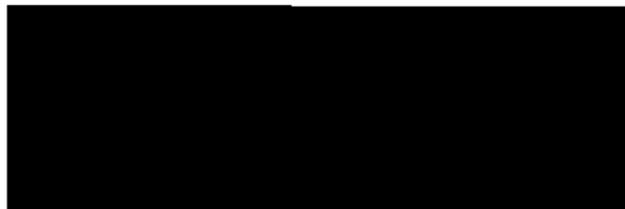
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: OCT 04 2010

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

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides healthcare management and has 2400 employees. It seeks to employ the beneficiary as a physical therapist graduate intern pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE and supporting documentation; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief and supporting evidence. The AAO reviewed the record in its entirety before reaching its decision.

The primary issue that the AAO will consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as a physical therapist graduate intern. The petitioner’s support letter dated March 15, 2008 describes the proffered position as follows:

The Physical Therapist Graduate Intern will gain valuable experience in inpatient acute care and outpatient care. The Physical Therapist Graduate Intern will aide Licensed Physical Therapists by assisting in providing services that help restore function, improve mobility, relieve pain, and prevent or limit permanent physical disabilities of patients suffering from injuries or disease. They will help restore, maintain, and promote overall fitness and health. The Physical Therapist Graduate Intern’s *patients* include accident victims and individuals with disabling conditions such as low-back pain, arthritis, heart disease, fractures, head injuries, and cerebral palsy. The Physical Therapist Graduate Intern will not engage in activities or procedures that are only lawfully performed by licensed Physical Therapists.

[Emphasis added.] The petitioner also states that, “[t]he position is open to graduate of Bachelor, Masters, or Doctorate of Physical Therapists programs. These graduates are either contemporaneously waiting for the results of their National Physical Therapy Examination (NPTE) examination [sic], or are studying to take the exam.”

Along with the petition, the petitioner submitted a copy of an offer letter to the beneficiary. The duties described are the same as those written in the support letter.

The petitioner also submitted documentation indicating that the beneficiary's pre-January 1, 2003 Indian bachelor's degree is equivalent to a U.S. bachelor's degree in physical therapy.

In the RFE issued on August 1, 2008, the director noted that the proffered duties as described are similar to those of a physical therapist assistant, which is not a specialty occupation. The director requested a detailed statement setting forth the beneficiary's proposed duties and responsibilities with an explanation of how the beneficiary's education relates to the proffered duties as well as how the proffered position differs from that of a physical therapist assistant. Additionally, the director requested information about how many other individuals are employed performing the proffered position's duties as well as how many of these individuals hold a bachelor's degree in a specific specialty.

Counsel for the petitioner responded to the RFE by stating that the person in the proffered position will not engage in activities that require licensure. Counsel argued that the proffered position is only open to graduates of bachelor's or higher degree physical therapy programs and that it is expected that the person in this position will qualify as a licensed physical therapist after passing the NPTE. Additionally, counsel states that at the time the beneficiary passes the NPTE, the petitioner will file a new H-1B petition notifying USCIS of the material change in job title and job description. Counsel further notes that the State of New York requires a Bachelor's Degree prior to completion of the NPTE and subsequent license and states, "[s]ince the [Physical Therapist Graduate Intern (PTGI)] must be eligible to take the NPTE examination, eligibility to take the examination is an absolute minimum requirement for entry into this particular position."

The petitioner did not submit any of the documentation requested by the director in the RFE, such as a detailed statement of the beneficiary's duties and an explanation of how the proffered duties differ from those of a physical therapist assistant.

The director denied the petition on October 14, 2008, noting the petitioner's failure to submit the evidence requested.

On appeal, counsel argues that the proffered position is not that of a physical therapist aide, but instead is that of a physical therapist graduate intern. Counsel states that the proffered position cannot be found in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. Additionally, counsel states that the proffered position is not one that requires a state license and that, although New York provides for limited permits, the beneficiary did not apply for one because they only last for six months. Counsel adds, "[i]t is Counsel's experience that, in instances such as these, the Service grants on[e] year approvals of H-1 petitions."

Additionally, counsel states that the proffered position is a new position, but the employer limits the position to those who hold bachelor's degrees. Counsel did not present any evidence from the petitioner that it has a newly created physical therapist graduate intern program with a minimum requirement of a bachelor's degree or its equivalent in physical therapy. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the *Handbook*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content.

According to the *Handbook*, a physical therapist assistant is not the same occupation as either a physical therapist or a physical therapy aide. The *Handbook's* description of physical therapist assistants and physical therapy aides is as follows:

Physical therapist assistants and aides help physical therapists to provide treatment that improves patient mobility, relieves pain, and prevents or lessens physical disabilities of patients. A physical therapist might ask a physical therapist assistant to help patients exercise or learn to use crutches, for example, or an aide to gather and prepare therapy equipment. Patients include accident victims and individuals with disabling conditions such as lower-back pain, arthritis, heart disease, fractures, head injuries, and cerebral palsy.

Physical therapist assistants assist physical therapists in providing care to patients. Under the direction and supervision of physical therapists, they provide exercise, instruction; therapeutic methods like electrical stimulation, mechanical traction, and ultrasound; massage; and gait and balance training. Physical therapist assistants record the patient's responses to treatment and report the outcome of each treatment to the physical therapist.

Physical therapist aides help make therapy sessions productive, under the direct supervision of a physical therapist or physical therapist assistant. They usually are responsible for keeping the treatment area clean and organized and for preparing for each patient's therapy. When patients need assistance moving to or from a treatment area, aides assist in their transport. Because they are not licensed, aides do not perform the clinical tasks of a physical therapist assistant in States where licensure is required.

The duties of aides include some clerical tasks, such as ordering depleted supplies, answering the phone, and filling out insurance forms and other paperwork. The extent to which an aide or an assistant performs clerical tasks depends on the needs and organization of the facility.

* * *

Most physical therapy aides are trained on the job, while almost all physical therapist assistants earn an associate degree from an accredited physical therapist assistant program. Most States require licensing for physical therapist assistants.¹

Even though physical therapist assistants and physical therapy aides both assist physical therapists, the physical therapist assistant earns an associate degree from an accredited physical therapist assistant program and usually must have a state license while the physical therapy aide is trained on the job and does not require a license.

The AAO hereby takes administrative notice of New York state statutes. The AAO further notes that under New York Education Law, Chapter 16, Title VIII, Article 136 § 6738:

A "physical therapist assistant" means a person certified in accordance with this article who works under the supervision of a licensed physical therapist performing such patient related activities as are assigned by the supervising physical therapist. Duties of physical therapist assistants shall not include evaluation, testing, interpretation, planning or modification of patient programs. Supervision of a physical therapist assistant by a licensed physical therapist shall be on-site supervision, but not necessarily direct personal supervision. The number of physical therapist assistants supervised by one licensed physical therapist shall not exceed the ratio of four physical therapist assistants to one licensed physical therapist as shall be determined by the commissioner's regulations insuring that there be adequate supervision in the best interest of public health and safety. Nothing in this section shall prohibit a hospital from employing physical therapist assistants, provided they work under the supervision of physical therapists designated by the hospital and not beyond the scope of practice of a physical therapist assistant. The numerical limitation of this section shall not apply to work performed in a hospital, provided that there be adequate supervision in the best interest of public health and safety.

As discussed previously, the brief and generically described duties for the proffered position include aiding licensed physical therapists in treating patients. Because the petitioner failed to provide a more detailed description of the proffered duties as was requested in the RFE, the AAO cannot determine how the proffered position's duties differ, if at all, from the position description of a physical therapist assistant under the New York statute and the *Handbook*.

However, even if the AAO were to find that the proffered position differs from that of a physical therapist assistant, the AAO notes that the New York Education Law, Chapter 16, Title VIII, Article 136 § 6736 only provides for the following exemption with respect to graduates of physical therapy programs:

¹ Therefore, according to the *Handbook*, a bachelor's degree in a specific specialty is not required for either the physical therapist assistant or the physical therapy aide. The *Handbook* thereby indicates that neither position constitutes a specialty occupation.

[T]his article shall not be construed to affect or prevent . . . [a] physical therapist graduate of an *approved* program from engaging in clinical practice under the on-site, but not necessarily direct personal supervision of a licensed physical therapist provided the graduate has: (a) applied and paid a fee for the licensing and examination, (b) applied and paid a fee for the temporary permit. This exemption shall not extend beyond ninety days after graduation.

[Emphasis added.] Therefore, New York has addressed physical therapist graduate interns in its statute on physical therapists and physical therapist assistants. Implicit in this exemption for physical therapist graduates of approved programs is that such graduates would normally be expected to engage in clinical practice and, if so, that either they must meet the requirements of the exemption listed above, or obtain the requisite licensing. The petitioner did not present evidence that the beneficiary would engage in clinical practice and that she either meets the requirements of the exemption for licensing, or had obtained the requisite licensing. Therefore, either the proffered position is not that of a physical therapist graduate intern or, even if it is, the beneficiary is not qualified to perform the duties of a physical therapist graduate intern under New York law.²

In addressing whether the proposed position is a specialty occupation, the AAO finds that the petitioner failed to provide a sufficiently detailed position description to determine whether the beneficiary's services would actually be those of a physical therapist graduate intern. The petitioner requested that the petition be granted for three years duration, but on appeal counsel states that such petitions are typically granted for one year. The petitioner does not provide any description of a graduate internship program or an explanation of why this program's duration would be for three years (or even one year). Indeed, it appears that the proffered position is newly created and the petitioner did not demonstrate the existence of other individuals who are employed at the petitioner's facilities with this job title, even though the petitioner claims to have 2400 employees. The petitioner failed to explain why it is now creating a physical therapist graduate internship position, other than for the beneficiary to start working for the petitioner while she waits to take her NPTE examination. The petitioner also did not submit any supporting documentation to show that it intends to employ other physical therapist graduate interns or that it has started a physical therapist graduate internship program.

Additionally, the AAO notes that the beneficiary received her foreign education from a university in India. As of July 2010, the Federation of State Boards of Physical Therapy have barred graduates who received their first professional degree from a physical therapy university program in India from taking the NPTE. Therefore, the petitioner's primary stated reason for employing the beneficiary in the physical therapist graduate intern position, so that she could gain experience while waiting for the results of the NPTE (an exam that the petitioner did not demonstrate the beneficiary has taken) or studying to take the NPTE exam, has become moot since the appeal was filed.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty

² It is further noted that, as the beneficiary's Indian bachelor's degree was awarded in November 2000, the above described 90-day post-graduation exemption did not apply to the beneficiary at the time this petition was filed on April 1, 2008.

or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

USCIS often looks to the *Handbook* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. As discussed previously, despite the position's title of physical therapist graduate intern, the petitioner failed to distinguish the proffered position's duties from those of a physical therapist assistant which, according to the *Handbook*, is not a specialty occupation. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

The petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty.

To establish its degree requirement as an industry norm, the petitioner has submitted two advertisements on appeal. This evidence, however, does not establish the petitioner's degree requirement as the norm within its industry as the first ad, which is for a physical therapy intern for a hospital in Wisconsin, does not state that at least a bachelor's degree or its equivalent in a specific specialty is required. The other advertisement is for a

graduate law clerk, which is a different occupation than the one proffered, for a firm that is in a different industry from the petitioner. As a result, these announcements do not establish a degree requirement in a specific specialty in parallel positions.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree.” The evidence of record does not refute the *Handbook’s* information to the effect that a bachelor’s degree or its equivalent is not required in a specific specialty. As evident in the earlier discussion, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than physical therapist assistants, which typically require an associate’s degree. The job description as well as the offer letter provided by the petitioner do not demonstrate that the duties rise to a level of complexity that requires at least a bachelor’s degree or its equivalent in a specific specialty.

On appeal, counsel has stated that the proffered position is newly created. As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor’s degree or its equivalent in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position’s duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO does not find that the proffered duties, as described by the petitioner in support of the petition, reflect a higher degree of knowledge and skill than would normally be required of physical therapist assistants. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a physical therapist assistant. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the additional requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director’s denial of the petition.

The AAO does not need to examine the issue of the beneficiary’s qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary’s credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, it cannot be determined how the proffered position’s duties can be distinguished from those of a physical therapist assistant, which is not a specialty occupation. However, counsel states, “[s]ince the PTGI must be eligible to take the NPTE examination, eligibility to take the examination is an absolute minimum requirement for entry into this particular position.” Therefore, even if the petitioner could demonstrate that the proffered position is a specialty occupation, because the beneficiary, as a physical therapy graduate from an Indian university, is currently barred from taking the NPTE examination by the Federation of State Boards of Physical Therapy, the beneficiary does not meet the petitioner’s minimum requirements. See *FSBPT Suspends NPTE Examination for All Graduates of Certain Overseas Programs in Response to Pervasive Security Breaches*, FSBPT.ORG, <https://www.fsbpt.org/newsandevents/securitybreach20100712/index.asp> (last visited Sept. 17, 2010).

Beyond the decision of the director, the AAO also finds that the petitioner failed to submit requested evidence that precludes a material line of inquiry. The petitioner and counsel did not provide additional documentation and details about the proffered position that were specifically requested by the director to provide further information that clarifies whether the proffered position is a specialty occupation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petition will be denied for this additional reason.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. The petition is denied.