

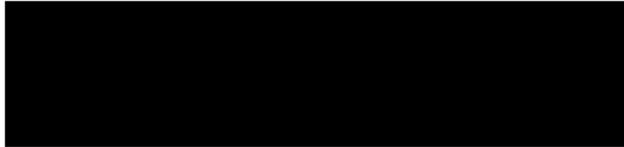
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

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U.S. Citizenship  
and Immigration  
Services



D2

FILE: [REDACTED] Office: VERMONT SERVICE CENTER

MAR 02 2011

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 \$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,

*for Michael T. Kelly*  
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 is engaged in computer programming services and seeks to continue to employ the beneficiary as a business development manager 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 based on his determination that: (1) the proffered position was not a specialty occupation; and (2) the LCA submitted with the petition was not valid for all potential work locations of the beneficiary. In addition, the director noted discrepancies in the record with regard to the position offered in relation to the petitioner's business operations.

On appeal, counsel contends that the director's conclusions were erroneous. In support of these contentions, counsel submits a brief and additional evidence.

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

The first issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job 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 (5<sup>th</sup> 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In a letter of support dated July 15, 2008, the petitioner stated that it was a South Carolina corporation formed in July 1999, and was currently engaged in contract computer programming services. Specifically, it claimed

to provide services to companies who outsource computer programming projects on a contract basis rather than hire programmers as full time employees. Regarding the proffered position, the petitioner indicated that the duties of the position included the following:

Computer programming sales and business development including computer programming services delivery, budgeting, project management and administration. Developing and implementing an account plan to target, identify and negotiate business opportunities. Negotiating financial and engagement terms within the sales process. Developing business leads; coordinating meetings to communicate technical strategic solutions; and managing client accounts and meeting client expectations.

The petitioner further claimed that the candidate for the position must possess a U.S. bachelor's degree or foreign equivalent, but did not indicate that the degree must be in a specific specialty. The petitioner also submitted an employment offer letter dated July 15, 2008, which indicated that the beneficiary's annual salary would be \$54,000.

The director found this initial evidence insufficient to demonstrate that the proffered position was that of a specialty occupation. Consequently, the director issued an RFE dated November 17, 2008, which requested additional information pertaining to the petitioner's business operations and organizational structure. Additionally, the director requested additional information regarding the proffered position, including more specific information pertaining to the duties and work location of the position. The director also requested clarification with regard to the beneficiary's work location, since the beneficiary's home address was listed as Prattville, Alabama, a town over 300 miles away from the petitioner's office in North Augusta, South Carolina. In a response dated December 22, 2008, counsel for the petitioner addressed the director's queries.

In response to the RFE, the petitioner, through counsel, submitted copies of the petitioner's tax returns and wage reports, along with a commercial lease, company overview, and explanations in response to specific queries of the director. Regarding the beneficiary's work location, the petitioner claimed that "the beneficiary can work from any location where he has an internet connection," and claimed that the beneficiary chose the location of Prattville, Alabama, because his wife had family there and the school system was superior to those in North Augusta, South Carolina.

The petitioner also submitted a more detailed job description for the proffered position, which is set forth below:

[The beneficiary] is working as a Business Development Manager with functions as building clients and managing them, he does not work at client locations but works from a remote location of his choosing, as most of his work is based on the web, he needs only an internet connection and a phone line. [The beneficiary] is the only Business Development Manager for [the petitioner], and one of his main functions is selling consultant services. [The beneficiary's] role is to find a project and match the project to an available consultant; matching a project consists of reviewing the resume of the consultant and understanding the technological needs of the client. [The beneficiary] searches for companies that are interested

in the technology that the petitioner offers; he interviews the potential client, gains understanding of the client's area of expertise, reviews the client's requirements, and submits paperwork for the closing of contracts. [The beneficiary] has excellent PR skills and he was patient as our company developed into who we are today. [The beneficiary] spends roughly 60% of his time on the internet and the telephone searching for new clients, reviewing the market trend and reporting back to us; 20% of his time reviewing resumes, setting up interviews, and preparing contracts; and 20% of his time working with consultants to understand their area of expertise in technology and understand the latest technology offered in order to match them with clients.

On April 22, 2009, the director denied the petition. Specifically, the director concluded that the petitioner had failed to submit evidence demonstrating that the duties of the proffered position were so complex or unique that only an individual with a degree in a specific specialty could perform those duties.

Upon review of all of the duties attributed to the proffered position, from the filing of the Form I-129 through the documents submitted on appeal, the AAO finds that they fail to establish that their performance would require the theoretical application of a at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, as required to establish that the position that they comprise merits recognition as a specialty occupation. In this regard, the AAO first notes that it is not self-evident that the duties as described in the record require a particular level of higher education in any specific field; and the petitioner fails to document any nexus between those duties and a need for at least a baccalaureate level of education in a specific specialty. The duty descriptions do not convey the substantive nature and educational level of whatever highly specialized knowledge the beneficiary would have to apply in the actual performance of his job functions, and the petitioner has not supplemented the record with documentation remedying this deficiency.

The AAO will now discuss the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations. The AAO recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup> The *Handbook* does not contain an occupation with the specific title of business development manager. Upon review of the described duties, the AAO concurs with the petitioner's contention on appeal that the proffered position encompasses some of the duties found in the description of the occupations of marketing manager and sales manager.

According to the 2010-2011 *Handbook*, the occupations under the heading of "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" are described as follows:

Advertising, marketing, promotions, public relations, and sales managers coordinate their companies' market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities. In small firms the owner or chief

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<sup>1</sup> All references herein are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

executive officer might assume all advertising, promotions, marketing, sales, and public relations responsibilities. In large firms, which may offer numerous products and services nationally or even worldwide, an executive vice president directs overall advertising, marketing, promotions, sales, and public relations policies. (Executive vice presidents are included in the *Handbook* statement on top executives.)

The *Handbook* describes marketing managers as follows:

*Marketing managers.* Marketing managers work with advertising and promotion managers to promote the firm's or organization's products and services. With the help of lower level managers, including *product development managers* and *market research managers*, marketing managers estimate the demand for products and services offered by the firm and its competitors and identify potential markets for the firm's products. Marketing managers also develop pricing strategies to help firms maximize profits and market share while ensuring that the firms' customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and they oversee product development.

Regarding sales managers, the *Handbook* states:

*Sales managers.* Sales managers direct the distribution of the product or service to the customer. They assign sales territories, set sales goals, and establish training programs for the organization's sales representatives. (See the *Handbook* statement on sales representatives, wholesale and manufacturing). Sales managers advise the sales representatives on ways to improve their sales performance. In large multiproduct firms, they oversee regional and local sales managers and their staffs. Sales managers maintain contact with dealers and distributors, and analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and to monitor customers' preferences. Such information is vital in the development of products and the maximization of profits.

A review of the duties of the proffered position indicates that a combination of the duties of marketing and sales manager most accurately corresponds to the position of business development manager. The AAO notes that according to the petitioner, the beneficiary is responsible for researching and locating new clients and promoting new sales.

While the AAO concurs with counsel's contention that the above-referenced category of occupations is most closely aligned with the proffered position as described, the description nevertheless remains vague and unsubstantial, particularly in light of the questionable operations of the petitioner. Regardless, while the proffered position appears to be a mélange of duties from the positions discussed above, it is not a specialty occupation.

The *Handbook* indicates that a wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs. Specifically, the *Handbook* states:

**Education and training.** For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

\* \* \*

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists. In small firms, in which the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

While the *Handbook* indicates that a bachelor's degree in a wide variety of specialties is preferred, it does not indicate that a degree in a specific specialty is the minimum requirement for entry into such positions.

In short, the AAO finds that, to the extent that it is described in the record of proceeding, the proffered position does not align with any occupational classification which the *Handbook* indicates as categorically requiring at least a bachelor's degree, or the equivalent, in a specific specialty. It should be further noted that the petitioner's requirements for the position do not require a candidate to have a degree in a specific specialty.

As the record of proceeding contains no evidence establishing that the proffered position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor has the petitioner satisfied either prong of the second criterion – the degree requirement is common to the industry in parallel positions among similar organizations or the position is so complex or unique that it can only be performed by a degreed individual.

The petitioner failed to submit any evidence demonstrating that, for the position of business development manager in organizations similar to that of the petitioner in its industry, there is a common requirement for at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner has likewise failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), by showing that the proffered position is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. Neither the descriptions of duties nor any other aspect of the record of proceeding so develops the proffered position in terms of uniqueness or

degree of complexity as required to meet the degree-requirement threshold of this criterion. The duties comprising the proffered position do not convey that requirement, and the petitioner has not supplemented the position and duties descriptions with any documentation demonstrating that the petitioner's business development coordinator position meets this standard.

Accordingly, the petitioner failed to establish its position as a specialty occupation under either of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next considers the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): the employer normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The petitioner failed to submit any evidence pertaining to its recruiting and hiring history. Accordingly, the petitioner failed to establish the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner's claimed degree requirement for the proffered position is not evidence of its normal employment practices.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Although the petitioner attributes numerous duties to the proffered position, the extent to which they are described in the record does not convey the degree of specialization and complexity required to satisfy this criterion. Though numerous, the duties as described in the record do not convey any aspect of their performance as requiring the application of at least a bachelor's degree level of a body of highly specialized knowledge in any specific specialty.

For the reasons discussed above, the AAO concludes that the petitioner has failed to establish that its proffered position meets the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Accordingly, the petitioner in the instant case failed to prove by a preponderance of the evidence that the beneficiary is coming to the United States to perform a specialty occupation. A petitioner must establish that a beneficiary is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). The petitioner has failed to establish that the proffered position qualifies as a specialty occupation.

The second basis for denial in this matter was the failure to submit an LCA that covered all work locations for the beneficiary. The issue before the AAO, therefore, is whether the petitioner established filing eligibility at the time the Form I-129 was received by USCIS.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission . . . .

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form . . . .

In cases where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed . . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the DOL when submitting the Form I-129.

In the instant case, the petitioner filed the Form I-129 with USCIS on July 18, 2008. The petitioner submitted a certified LCA with the petition, indicating that the beneficiary's work location would be North Augusta, South Carolina. However, it came to light that the actual work location was not in South Carolina as claimed, but in Prattville, Alabama, a town located over 300 miles from the claimed location on the LCA. Therefore, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA identifying the beneficiary's work location(s) and, therefore, as indicated by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

In the denial, the director additionally noted that the petitioner also maintained an office in Oklahoma as evidenced by a commercial lease submitted in response to the RFE, which further raised questions regarding the actual work location of the beneficiary. On appeal, the petitioner does not address the requirement to submit a certified LCA at the time of filing. Rather, counsel for the petitioner submits two new LCAs certified on June 15, 2009, indicating work locations of Prattville, Alabama and Edmond, Oklahoma. The submission of these new LCAs does not overcome the basis for the denial in this matter.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*,

17 I&N Dec. 248 (Reg. Comm. 1978). Although the petitioner acknowledges that the beneficiary was working remotely from the Prattville, Alabama location at the time the petition was filed, the LCA did not identify this location on the LCA submitted with the petition. The petitioner, therefore, failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

Therefore, for the reasons already discussed, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO notes numerous discrepancies with regard to the evidence submitted by the petitioner. As discussed briefly by the director, the petitioner does not have a telephone number and claims it only uses cellular phones. Moreover, it contends that its corporate offices are based in South Carolina, yet did not produce a lease demonstrating it maintained a business presence in South Carolina when requested by the director. Finally, the petitioner, although claiming to be rapidly expanding, does not maintain a listing in the white or yellow pages, which raises questions regarding the validity of the petitioner's business operations. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If USCIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The AAO is not convinced, based on the evidence of record, that the scope of the petitioner's operations is to the extent claimed in the petition.

For this additional reason, along with the reasons related in the preceding discussion, the petitioner has failed to establish eligibility in this matter. Accordingly, the AAO shall not disturb the director's denial of the petition.

The AAO notes that USCIS approved a prior petition that had been filed by the petitioner on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). The prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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 sustained that burden.

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**ORDER:** The appeal is dismissed. The petition is denied.