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U.S. Citizenship and Immigration Services

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FILE: [redacted] SRC 04 126 51509 Office: TEXAS SERVICE CENTER Date: DEC 1 4 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a limited liability company organized in the State of Florida in December 2001.[1] It invests in property and develops residential and business complexes. It seeks to employ the beneficiary as its operations manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner: had not established that the beneficiary was exercising managerial or executive duties; had not reconciled inconsistencies between the petitioner's 2003 Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income and its 2003 financial statement; and, had presented confusing and conflicting information regarding its business operations, such that the petitioner had not established that it continued to do business.

On appeal, counsel for the petitioner asserts the evidence submitted shows that: the petitioner has the ability to pay the beneficiary the proffered annual wage of $26,000; the petitioner has secured and signed binding contracts for closing on real estate; and, the beneficiary is working for the petitioner in a managerial capacity. Counsel submits a brief and evidence in support of the appeal.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or

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[1] The director observed that the Texas Service Center had improperly accepted the petition in this matter, as the Form I-140, Immigrant Petition for Alien Worker identified two entities, [redacted], LLC and [redacted], LLC, as the petitioner and the beneficiary's U.S. employer. Counsel asserts that there is no authority that prohibits two companies filing as joint petitioners. The AAO determines that the statute's reference to "employer" in the singular limits the petitioner in each matter to one entity. The AAO notes that counsel identified [redacted] LLC as the most active entity and, as such, is the petitioning entity in this matter. The AAO will consider evidence in support of [redacted], LLC's appeal in this matter.

> to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

Although the director did not explicitly determine that the petitioner had not established its ability to pay, the director referenced this requirement for petitions filed for employment-based petitions. On appeal, counsel for the petitioner asserts that the director should have made a positive ability to pay determination.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

In this matter, the petitioner in a March 24, 2004 letter submitted in support of the petition, indicated that it had the financial backing of the Larbro trust fund that provided 90 percent of the petitioner's (and a separate affiliate's) investments. The petitioner also provided its 2003 balance sheet; copies of checks made out to the beneficiary, the petitioner's general manager identified as the beneficiary's brother, the petitioner's administrative manager identified as the beneficiary's sister, and two individuals who were not identified as holding positions for the petitioner or enjoying a family relationship with the principals of the petitioner.

In a December 16, 2004 notice of intent to deny, the director requested, among other things, the petitioner's "2003 income tax return with the corresponding W-2s and 1099s."

In response, the petitioner provided a copy of its 2003 Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income, showing that no salaries or wages or guaranteed payments to partners had been made and current assets of $1,932,491 consisting principally of construction in progress valued at $1,595,342. The petitioner also provided two 2004 IRS Forms W-2, Wage and Tax Statement, both issued in the amount of $1,600 and three 2003 IRS Forms 1099, Miscellaneous Income, issued in the amounts of $31,500, $42,500, and $38,500, the last issued to the beneficiary. The petitioner also provided a letter from its accountant referencing the company's land purchase and value and stating that the petitioner's business of construction and development typically did not realize profits until the completed units had been sold.

On February 17, 2005, the director denied the petition, observing that the petitioner's IRS Forms 1099 did not indicate employment of the beneficiary or the petitioner's other claimed employees. The director extrapolated from this observation and the lack of other information in the record that the petitioner had not shown that the beneficiary would be exercising managerial or executive duties.[2]

On appeal, counsel for the petitioner observes that CIS will review a petitioner's employment of the beneficiary, its net income, and its net assets to determine a petitioner's ability to pay the proffered wage. Counsel also submits the petitioner's 2004 IRS Form 1065 and references the petitioner's net assets as detailed on the IRS Form 1065. Counsel asserts that the petitioner's net assets in 2004 are sufficient to demonstrate the petitioner's ability to pay the beneficiary the proffered annual wage of $26,000.

Counsel's assertion is persuasive. The evidence in the record is sufficient to establish that the petitioner has the ability to pay the beneficiary the proffered wage. The director's inference that the petitioner may not have had the ability to pay the proffered wage is withdrawn.

The next issue in this proceeding is whether the petitioner has continuously been doing business thus maintaining the required multinational aspect of this visa classification. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States." The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

The director denied the petition on February 17, 2005, determining that the petitioner had failed to establish that it was continuing to do business as required. The director noted the lack of income on the petitioner's 2003 IRS Form 1065 and found that the "return given, the 2003 invoices, 1099 wages, and all other evidence showing business operations" was confusing and conflicting.

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[2] As observed above, the director does not explicitly determine that the petitioner has not established its ability to pay the proffered wage and instead uses the information and lack of information in the record to determine that the beneficiary will not be employed in a managerial or executive capacity. The AAO will address the issue of the beneficiary's managerial or executive capacity later in this decision.

On appeal, counsel for the petitioner references the petitioner's business lease, bank statements, purchase invoices, sale contracts for reserved townhouses, utility bills, occupational license, documentation for two construction projects, financial statements, proof of payments, and property taxes. Counsel asserts that this previously submitted documentation is evidence that the petitioner is doing business. Counsel also attaches the petitioner's 2004 IRS Form 1065, showing sales in the amount of $1,436,975 and a March 10, 2005 letter from the petitioner's accountant stating that the petitioner had continued operations throughout 2004 and had sold four of six units located in Miami Beach, Florida in November and December 2004.

Counsel's assertion is persuasive. The critical focus in the definition of "doing business" is not whether the petitioner is an agent or representative office, but whether the entity constitutes the "mere presence of an agent or office" without conducting any business activities. The proper focus on this issue thus, is the nature and conduct of the petitioner's business activities, if any. In the case at hand, the petitioner has presented evidence that it has been involved in a number of real estate transactions. The petitioner has submitted sufficient evidence to establish that it is engaged in the purchase of real property, development of the property, and sale of the completed product. The petitioner has adequately established that it is engaged in facilitating the regular, systematic, and continuous provision of goods and services. The director's decision will be withdrawn as it relates to the question of whether the petitioner was doing business in a regular, systematic, and continuous manner.

The next issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
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> iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the

> supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a March 25, 2004 letter appended to the petition, the petitioner indicated that the beneficiary would be employed in the position of operations manager for the U.S. entity. The petitioner indicated that as operations manager, the beneficiary:

> [W]ill continue to be responsible for managing construction operations of the company. He will plan and devise schedules for all construction contractors and architects to adhere to. He will supervise the development of all construction sites. He will monitor funds allocated to each construction project and ensure that budgetary requirements are adhered to. He will interview and hire architects and engineers for all construction sites. He will ensure that all construction licenses and permits are obtained and properly issued. He will direct and coordinate new investment and construction projects for our further growth and expansion. He will research other markets of interest and develop ways to tap into them at the lowest cost possible. He will negotiate important contracts with construction contractors and vendors for construction products. He will ensure that all construction projects are on schedule. He will have full authority and discretion over the hiring and firing of subordinate managers, employees[,] and contractors.

The petitioner also listed its personnel and the companies the petitioner contracted with to perform services. The petitioner identified a general manager, an administrative manager, a sales manager, and the beneficiary's position of operation manager. The petitioner also listed a general contractor, electrical, plumbing, stucco, steel rebar, and aluminum contractors as well as vendors who provided products and services to the company. The petitioner also provided its projected organizational chart for 2004-2006 that identified a general manager with four subordinate managers, including the administrative manager, sales manager, construction manager,

and the beneficiary's position as operations manager. The organizational chart depicted the general contractor and several independent contractors and vendors subordinate to the beneficiary's position.

On December 16, 2004, the director issued a notice of intent to deny the petition, noting, among other things, that the petitioner's organizational chart depicted several managers. The director requested that the petitioner state in detail the job duties of each manager and who and what they supervised or managed.

In response, counsel for the petitioner provided brief job descriptions for seven of the petitioner's claimed full-time employees. The petitioner indicated that the general manager negotiated contracts, solicited bids, monitored the performance of contractors, acquired lands, planned construction for new developments, negotiated with local government, public interest groups, and public utilities to gain support for planned projects, helped negotiate loans to finance construction, and had authority to hire, promote, suspend, and fire employees and contractors. Counsel for the petitioner provided the same description for the beneficiary's position of operations manager as had been previously provided. Counsel added that the beneficiary supervised one permanent full-time assistant manager, one permanent full-time secretary, and approximately 20 subcontractors, and coordinated the subcontractors, managers, and laborers to ensure timeliness and efficiency.

The petitioner indicated that the petitioner's administrative manager ensured that all payments were properly executed, hired and interviewed contractors, supervised and directed all payroll activities, ensured that all employees and construction contractors were compensated for their services, negotiated contracts with construction vendors, analyzed and researched methods to reduce costs of construction, implemented work standards, oversaw sales and financing, hired and trained employees in administrative functions, and supervised subordinate managers, clerical workers, and contractors. Counsel noted that the sales manager created the sales department, and managed sales activities, analyzed sales statistics, formulated policy to assist in promoting sales, supervised and directed all employees who worked in the sales department, reviewed market analysis, developed sales campaigns, and controlled expenditures, prepared sales reports, and supervised realtors. Counsel indicated that the construction manager directed staffing and performance evaluation to develop and control the construction program, supervised and directed all employees, contractors, and subcontractors that the company hired, and would hire workers for the construction department and construction sites, analyzed and controlled expenditures of the division, prepared reports showing construction volume and advances, and supervised approximately 17 subcontractors. Counsel noted that an assistant manager updated accounts payable and receivable, prepared bank deposits, dealt with clients, providers, subcontractors, and government agencies, ordered supplies and new equipment, gathered documents for licenses and other construction projects, conducted research, and supervised other clerical staff. Lastly, counsel identified a secretary and indicated she answered phones, scheduled appointments, filed, and typed routine correspondence. Counsel also listed a number of contractors and vendors.

The director denied the petition on February 17, 2005 observing that the petitioner's IRS Forms 1099 and lack of Form 1099s for contractors could not establish that the beneficiary would be exercising managerial or executive duties.[3]

On appeal, counsel for the petitioner references a number of invoices issued to the petitioner for services rendered and goods provided that had been provided with the initial petition and attaches additional invoices and checks issued to various vendors and building services. Counsel asserts this information is evidence of payments made to contractors. Counsel contends that the beneficiary's duty to manage, direct, and supervise 40 subcontractors is exercising managerial duties.[4]

Counsel's assertion is not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). First, the petitioner has provided a general description of the beneficiary's duties. For example, the petitioner indicates the beneficiary is responsible for managing construction operations, supervising the development of all construction sites, monitoring funds allocated to construction projects, ensuring that budgetary requirements are adhered to, and directing and coordinating new investment and construction projects. Reciting vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The description of the beneficiary's duties includes the general oversight exercised by an owner of a business and is not sufficient to elevate the beneficiary's position to that of a manager or executive.

In addition, the portions of the description that contain more detail suggest that the beneficiary will be performing routine operational tasks, such as planning schedules, obtaining licenses and permits, researching other markets, and negotiating contracts on behalf of the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

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[3] As noted above, the record contained two 2004 IRS Forms W-2, Wage and Tax Statement, both issued in the amount of $1,600 and three 2003 IRS Forms 1099, Miscellaneous Income, issued in the amounts of $31,500, $42,500, and $38,500, the last issued to the beneficiary.

[4] Counsel also takes issue with the director's determination that the vendors and individuals who provide electrical, plumbing, demolition, and other services for the petitioner are not employees. Counsel argues that as long as the petitioner has the right to direct and control how a worker performs the task, the contractors are subordinate to the petitioner and the beneficiary as a manager. The AAO acknowledges that the use of contractors to perform some of the petitioner's tasks may be relevant to the determination of whether a beneficiary is primarily performing managerial or executive tasks. In this matter, however, the relevance of the petitioner's control of contractors is not the principal issue in the determination of whether the beneficiary is performing in a primarily managerial or executive capacity.

Second, the AAO observes that the petitioner has provided similar descriptions for the beneficiary's position, the general manager's position, the construction manager's position, as well as the administrative manager's position. The descriptions contain overlapping duties and it is not clear which "manager" bears the responsibility for managing the various tasks. The record shows that the beneficiary's family members in these positions, who also own a percentage of the petitioner, are engaged in the general oversight of the development of a six-unit townhouse project and the purchase of land to begin another small construction project. The record does not establish that the petitioner could support the employment of three or four individuals in the positions of construction, operation, administrative, and general manager. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Third, the record contains inconsistencies regarding the duties described. For example, the petitioner indicates that the beneficiary oversees 20 subcontractors and the construction manager oversees 17 subcontractors; however on appeal, counsel indicates that the beneficiary manages 40 subcontractors. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, neither counsel nor the petitioner has adequately established through a description of actual duties or documentary evidence that the beneficiary is the individual primarily responsible for the oversight or management of the subcontractors. For example, many of the invoices submitted are addressed to the petitioner but to the attention of the general manager, not the beneficiary in his position as operations manager. This suggests that the general manager is the principal contact between the petitioner and the subcontractors. There is no other documentary evidence to suggest that the beneficiary is the individual who oversees, directs, or supervises subordinate subcontractors. Again, 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. at 165. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Id.*

The record in this matter is deficient in establishing that the beneficiary will be employed in a primarily managerial or executive capacity. The general description of the beneficiary's duties, the similar descriptions of duties of the other "managers" employed by the company, the lack of documentation establishing the beneficiary's supervision of subcontractors, and the inconsistencies in the record, when taken together cast doubt on the legitimacy of the beneficiary's position. 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. at 591.

The record is not sufficient to establish that the beneficiary's duties comprise primarily managerial or executive duties. For this reason, the appeal will be dismissed.

The final issue in this matter is whether the approval of two past Form I-129 nonimmigrant petitions requires approval of the Form I-140 immigrant petition. The AAO acknowledges that CIS approved other petitions that had been previously filed on behalf of the beneficiary and that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). However, although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Moreover each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition.

In addition, if the previous nonimmigrant petitions were approved based on the same unsupported 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 CIS 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).

Further, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

Finally, the AAO observes that the director was justified in departing from the previous nonimmigrant approvals in this matter; and that the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed