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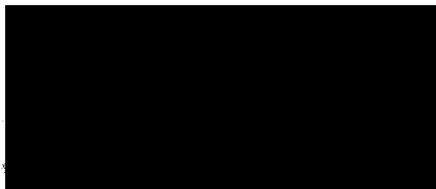
FILE: [REDACTED]
WAC 03 256 50017

Office: CALIFORNIA SERVICE CENTER Date: DEC 21 2005

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

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:



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, California Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Hawaii in September 2000. It produces, plans, and structures Internet web sites, which provide travel information, personal asset management information, real estate brokerage information, incorporation information, healthcare service provider information, and coordinates dentistry services for local residents and visiting tourists. It seeks to employ the beneficiary as its president. 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.

On May 25, 2005, the director denied the petition, determining that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

Counsel asserts that Citizenship and Immigration Services (CIS) errs in several regards. Counsel submits a brief 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 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).

The issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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

- 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;
- 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
- 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

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and

- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a September 4, 2003 letter appended to the petition, the petitioner described its business as an Internet information provider with three major components. The petitioner indicated it provides information to its membership in the areas of: (1) dental and medical services by coordinating with dentists and other medical service providers and patients traveling to the United States; (2) travel by providing a guidebook for individuals who want to create their own vacation plan; and, (3) property by providing clients with fund management expertise, assisting in the acquisition of U.S. financial products and real estate, and collaborating with attorneys and accountants to assist those who want to start a business in Hawaii. The petitioner indicated that under the beneficiary's direction, the petitioner had hired five full-time employees, leaving the beneficiary free to concentrate on overseeing the future growth and development of the firm. The petitioner stated that:

[The beneficiary] is responsible for managing and directing all development activities of [the petitioner] as they pertain to our international operations. This includes communicating the technological and development direction of [the petitioner] to our parent company in Japan on a regular basis. [The beneficiary] routinely meets with various technical specialists, system information firms, the Japan Dentist Association and marketing firms to ensure that our corporate philosophy is understood and is being delivered and executed accurately over the Internet. [The beneficiary's] role as the President provides significant contributions in the formulation of strategic Internet computer product services to ensure that the business and strategic policies of [the petitioner] are effectively incorporated into our global business activities.

The petitioner added that the beneficiary: "has autonomous control over and exercises wide-latitude and discretionary decision-making in establishing the most advantageous courses of action for our international development activities." The petitioner also provided its organizational chart depicting the beneficiary in the position of president, a vice-president, a general manager, a tour coordinator, a web designer, and a translator. The chart also identified two directors and a system engineer located in Japan.

On August 25, 2004, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested: a more detailed description of the beneficiary's duties, including the percentage of time the beneficiary spent on each listed duty and whom the beneficiary directs including their job title and position description; an organizational chart describing its managerial hierarchy and staffing levels as of the date the petition was filed and listing all employees under the beneficiary's supervision by name and job title, and including a brief description of their job duties; and the petitioner's wage report for the last four quarters and the job title and duties for each employee listed on the wage report.

In a November 15, 2004 response, counsel for the petitioner stated that the beneficiary served as both an executive and a manager, that she directed and developed the petitioner's Internet trade business, and oversaw and directed the entire operation of the corporation. Counsel added:

[The beneficiary] has full responsibility for planning, and implementing administrative and operational polices [sic] and procedures. As the President of [the petitioner], her duties include conducting the general administrative affairs of the company, acting as liaison and representative for [the petitioner's] foreign parent firm in the U.S., marketing the services of their parent company, engaging in long-range planning and identifying business opportunities in the U.S. and international markets, directing business activities, and supervising other professionals and manager.

Counsel continued:

As the President and founder of the corporation [the beneficiary] occupies the highest executive/managerial position and supervises other managerial personnel. In her executive capacity as President of [the petitioner], [the beneficiary] also has full control of corporate funds, controlling risk and maximizing the return on funds under her control. [The beneficiary] plans and develops public relation policies to improve and further expand the company's image and revenue.

[The beneficiary's] key role is to direct and control the diversified information offered by [the petitioner] whereby the firm networks three major diversified components (medical, travel encyclopedia, and property management) through information technology.

Counsel noted that the beneficiary duties are overlapping and run concurrently so that it was difficult to assign a percentage figure for each duty. The petitioner provided a similar organizational chart as had been provided with the petition, adding that the web designer was also a system engineer and programmer.

The petitioner indicated that: the vice-president was responsible for public relations, directing and planning corporate marketing tools and incentives, and also assisted the president in setting goals, policies, sales strategies, developing objectives, improving system capabilities, and making financial decisions; the general manager/market researcher conducted market research and analysis, oversaw the overall Internet trade network system, promoted sales incentives, planned events, and trained U.S. workers, dealt with a third party to maintain and improve web-hosting services, conducted a feasibility study to determine the firm's future growth and stability; the web designer/system programmer designed graphics and copy layouts for presentation on the website, developed, organized, and managed all of the web designs and programming software provided by a third party, and utilized computer software to advertise the petitioner's services; the tour coordinator planned and coordinated travel accommodations and optional tours for customers and assisted with reservations; and, the translator provided translation services.

On February 4, 2005, the director again requested evidence on this issue. The director requested a more detailed description of the beneficiary's duties and highlighted the request for a percentage allocation to each of the beneficiary's listed duties. The director also requested the petitioner's employee wage report for the last three quarters of 2003 and for all four quarters of 2004.

In an April 22, 2005 response,¹ the petitioner indicated that the beneficiary would spend 50 percent of her time on the daily affairs of the business: insuring that the appointed personnel in charge of each division discharged their duties according to policies and procedures; selecting the firm's services and products; protecting the company's interest; participating in production meetings to make decisions to assure that the company goals and objectives are met; insuring compliance with statutory and other legal requirements; disbursing funds for expenses and dividends; signing monetary instruments on behalf of the company; exercising all powers to promote the interest of the petitioner and to enhance the value of its services; and, maintaining accurate lists and descriptions of the company's capital assets. The petitioner indicated the beneficiary would spend 35 percent of her time overseeing and developing the information offered by the petitioner through the internet; meeting with corporate executives, accountants, lawyers, and information technology professional to ensure ongoing business relationships, securing strategic internet computer product services, passing on strategic policies to subordinates, and overseeing and developing financial strategies for new ventures. The petitioner indicated the beneficiary would spend the remaining time performing and executing contracts and performing public relations.

The petitioner also provided its Hawaiian Quarterly Wage Contribution and Employment and Training Assessment Report for the quarter in which the petition was filed. The report confirmed the employment of the beneficiary, the individuals in the positions of general manager, vice-president, translator, web designer,² and tour coordinator. The wages of the tour coordinator and the vice-president suggested that these two individuals were employed intermittently or part-time. The petitioner also provided other quarterly wage reports requested by the director.

On May 25, 2005, the director denied the petition. The director observed that the petitioner's quarterly wage reports for the last three quarters of 2003 and the four quarters of 2004 showed that only the beneficiary and the general manager worked full-time. The director noted specifically that the vice-president had only been paid \$1,500 for each of the quarters; that the tour coordinator had not been on the payroll subsequent to the quarter in which the petition was filed; and that neither the translator nor the web designer had been paid the salary the petitioner had indicated as their full-time salary on any of the seven quarterly wage reports. The director concluded from his observation that the beneficiary would be performing a major portion of the petitioner's functions. The director noted that the petitioner had included three employees in Japan on its organizational chart but had not provided evidence that they worked for the petitioner or what they did as the beneficiary's subordinates. The director also noted that the petitioner had provided job descriptions for the beneficiary's subordinates but that the evidence did not establish that the subordinate staff were professional, managerial, or supervisory employees or that they would relieve the beneficiary from performing non-qualifying duties. The director determined that the description of the beneficiary's duties was vague and general and did not convey an understanding of what the beneficiary would do on a daily basis. The director denied the petition because the petitioner had not shown that the beneficiary would be employed in a managerial or executive capacity.

¹ The AAO has roughly paraphrased the petitioner's response in an attempt to obtain a comprehensible delineation of the beneficiary's duties, rather than reciting the esoteric and vague description provided.

² The wage report also included the name of an individual the petitioner indicated had held the position of web designer prior to the web designer/programmer listed on the organizational chart.

On appeal, counsel for the petitioner finds fault with the director's decision in several respects. Counsel asserts that the beneficiary, as the founder, president, chief executive officer, and chief financial officer of both the parent firm in Japan and the petitioner, clearly directs and makes the strategic decisions for both firms and is an executive of an international corporation. Counsel claims that the evidence substantiates that the petitioner and the Japanese entity have a substantial number of employees, as well as numerous contracting firms with whom they cooperate, and that neither firm could operate without someone making the necessary executive decisions. Counsel does not dispute that some of the petitioner's employees may be part-time employees but contends that the director's conclusion that this requires that the beneficiary perform non-qualifying duties is speculative. Counsel argues that the president's day-to-day duties are to direct and run the company, make all executive decisions required, and direct its employees. Counsel asserts that the beneficiary is the guiding force behind the petitioner's growth and that the petitioner and the beneficiary are the parties Congress intended to benefit when it established this visa classification. Counsel also observes that the petitioner had successfully petitioned for the beneficiary in the L-1A nonimmigrant visa category which has similar requirements to this immigrant visa classification.

Counsel's assertions are not persuasive. In this matter, counsel does not explain or clarify how the beneficiary's position as the president and founder of the petitioner and the foreign entity results in the beneficiary's performance of primarily managerial or executive duties for the United States entity. 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). Reciting the beneficiary's 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). Owning a company and overseeing and directing its operations does not necessarily equate to performing primarily managerial or executive duties.

For example, the petitioner initially indicated that the beneficiary was responsible for all "development activities" and "provide[d] significant contributions in the formulation of strategic Internet computer product services." The petitioner does not clarify the phrase "development activities," nor does the petitioner explain or provide examples of the beneficiary's significant contributions. In response to the director's request for further evidence, counsel indicates that she plans and implements administrative and operational policies and procedures. However, the record does not include examples of the petitioner's policies and procedures. Counsel seems to indicate that the beneficiary markets the services of the company, identifies business opportunities, and spends time supervising subordinates. However, the record does not indicate how much time the beneficiary spends on these tasks or whether the beneficiary is primarily performing these tasks or is performing primarily executive duties associated with these tasks. 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).

The AAO recognizes that the beneficiary is the petitioner's ultimate owner and has control of corporate funds and decision-making; however, neither counsel nor the petitioner provide evidence that the beneficiary's control of the company elevates her position to that of an executive rather than an individual who performs

the necessary tasks to operate the company's internet-based services. For example, the record does not clarify who is selling the petitioner's internet services, promoting the use of company's website to encourage businesses and individuals to use the website, or who directly supervises the web designer, translator, and tour coordinator when they are employed, if not the beneficiary. 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)).

In the second response to the director's request for more detailed evidence of the beneficiary's daily duties, the petitioner indicated, among other things, that the beneficiary made sure personnel discharged their duties, selected the firm's service products, and promoted the petitioner's interest. These duties appear to relate to the operational tasks of supervision, buying ideas or products, and marketing the petitioner's services and are more task oriented than managerial or executive. In addition, the beneficiary participates in production meetings, disburses funds, oversees and develops the information offered on the website, meets with other businesses to coordinate services offered on the internet, secures product services, executes contracts, and performs some public relations. The totality of the descriptions of the beneficiary's duties suggests that the beneficiary is the driving force bringing businesses to the Internet and selling and promoting those services to its members. The record does not sufficiently detail the beneficiary's actual duties to differentiate her duties from that of an individual performing the necessary tasks to operate the company. Accordingly, the petitioner's description is insufficient to establish the beneficiary performs primarily executive or primarily managerial tasks on behalf of the company.

Counsel's claim that the evidence substantiates that the petitioner and the Japanese entity have a substantial number of employees, as well as numerous contracting firms with whom they cooperate is not persuasive. The petitioner has provided evidence that it employs individuals other than the beneficiary, but it has not substantiated who in the company performs the tasks necessary to obtain its sales. Whether most of the firm's business is done over the Internet is immaterial. In this matter, the record does not provide sufficient evidence that the beneficiary performs primarily managerial or executive functions rather than performing the petitioner's necessary daily operational and administrative tasks. Again, 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. at 604. In addition, the petitioner has not provided evidence of contracts with other firms or evidence that the Japanese employees, even if documented, would elevate the beneficiary's role in the United States to that of a multinational manager or executive. 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.

Counsel does not dispute that some of the petitioner's employees may be part-time employees but contends that the director's conclusion that this requires that the beneficiary perform non-qualifying duties is speculative. Counsel should note that the statute requires that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product

or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. In other words, the petitioner must provide evidence that the beneficiary will be relieved from performing the operational, administrative, or first-line supervisory tasks necessary to operate a business. To meet this burden, the petitioner must provide evidence of other employees who actually perform the petitioner's daily operational, administrative, and supervisory tasks. In some circumstances, the beneficiary's function may be to primarily supervise personnel, and if so, the petitioner must establish that the subordinate employees under the beneficiary's supervision are supervisory employees, professional employees, or managerial employees. See § 101(a)(44)(A)(ii) of the Act. The director in this matter properly recognizes that there are different ways a beneficiary could be considered a manager or executive as defined in the statute, but also recognizes that the petitioner has not provided the necessary evidence to establish that the beneficiary fulfills the statutory criteria of either a manager or an executive.

Counsel argues that the president's day-to-day duties are to direct and run the company, make all executive decisions required, and direct its employees. Counsel asserts that the beneficiary is the guiding force behind the petitioner's growth and that the petitioner and the beneficiary are the parties Congress intended to benefit when it established this visa classification. The AAO recognizes the beneficiary's business acumen and drive to establish an Internet business. However, to establish eligibility for this visa classification, the petitioner is required to clearly detail the beneficiary's duties and when questions arise regarding the performance of non-qualifying duties, must articulate and substantiate that the beneficiary's duties are primarily managerial or executive and not the day-to-day tasks associated with operating a business.

The record is deficient in establishing clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. Despite two requests for a detailed description of the beneficiary's duties, the petitioner has failed to provide a description for the beneficiary's tasks that conveys an understanding of what the beneficiary does on a daily basis. In addition, the petitioner has submitted no realistic information to establish the percentage of time the beneficiary actually performs or will perform the claimed executive duties. 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). This failure of documentation is important because the record suggests that several of the beneficiary's tasks, such as supervising, buying ideas or products, and marketing the petitioner's services, do not fall directly under traditional managerial or executive duties as defined in the statute.

The director correctly used a precedent decision to inform counsel and the petitioner that it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In this matter, the petitioner has not established that the beneficiary will perform primarily managerial or executive tasks.

Of note, the director does not require that the beneficiary be both a manager and an executive as defined by the statute but rather requires that the petitioner clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. The petitioner may not claim that the beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions to establish eligibility.

However, if the petitioner *chooses* to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

Counsel's reference to the petitioner's successful petitioning for the beneficiary for an L-1A classification is noted. With regard to the similarity of the eligibility criteria, the AAO acknowledges 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). 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.

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.