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BU

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 21 2005
WAC 04 013 52077

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 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 Arizona in 1995. It operates a school of mobile electronics. It seeks to employ the beneficiary as its director of online operations. 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 would be employed in a managerial or executive capacity for the U.S. petitioner.¹

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) misstates facts, fails to consider a number of facts, uses incomplete boilerplate language, and substitutes the adjudicating officer's judgment for that of the petitioner. 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.

¹ The director's opening paragraph in his decision indicated that the petitioner had filed Form I-129, Petition for Nonimmigrant Worker, to classify the beneficiary as an intracompany transferee. The director recites the law applying to a Form I-140, Immigrant Petition for Alien Worker, the statutory definitions of managerial and executive capacity, and the regulatory definition of subsidiary, which apply to the adjudication of a Form I-140 petition. Although the inaccurate reference to a Form I-129 petition is unfortunate, the AAO finds the error harmless in this particular instance. The director's decision is adequate to give the petitioner and counsel notice of the issues the director found deficient in the Form I-140 adjudication.

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 24, 2003 letter appended to the petition, the petitioner stated:

As [redacted] [the beneficiary's] responsibilities include the following: making and executing decisions concerning day-to-day operations affecting Online Operations. Specifically, [the beneficiary] oversees the management and maintenance of the company's online presence; directs the development, implementation and management of the company's Employer Resource Web site; and directs the development, implementation and management of an Internet-based training program (offered in several languages) for oversees [sic] students and previously certified students seeking advanced certification levels. He also oversees the integration of the front-end and back-end of the Internet based training web site. He manages client's online needs and manages the expansion and implementation of client Internet training programs. He ensures the implementation and compliance of [redacted] [redacted] the foreign entity] corporate policies, procedures, and reporting, all of which are essential functions within the organization. Additionally, [the beneficiary] has the authority to hire, fire, promote, and authorize leave.

The petitioner provided its organizational chart showing the beneficiary's position of online operations director reporting to the director of U.S. operations and showing an administrative assistant subordinate to the beneficiary's position. The organizational chart also showed an unfilled position of program developer subordinate to the beneficiary's position.

On September 22, 2004, the director requested a more detailed description of the beneficiary's duties including whom the beneficiary directs including their job title and position description, all employees under the beneficiary's direction, and the percentage of time the beneficiary spends in each of the listed duties. The director also requested the petitioner's organizational chart describing its managerial hierarchy and staffing levels as of the date of the petition filing which should include: the current names of all executives, managers, supervisors, and number of employees within each department or subdivision in the beneficiary's hierarchical chain; the beneficiary's position in the chart and all employees under the beneficiary's supervision by name and job title; and a brief description of job duties, educational level, date of employment, and annual salary for each employee under the beneficiary's supervision, and the source of remuneration of all employees. The director also requested copies of the petitioner's quarterly wage reports.

In a December 8, 2004 letter appended to counsel's January 5, 2005 response, the petitioner indicated that the beneficiary spent 70 percent of his time overseeing and managing the development of the petitioner's online installation courses and testing procedures. The petitioner states that this responsibility included overseeing the core development of course material related to online training, creating the course content, creating accompanying diagrams or images to support the text, developing quizzes and test questions to test the student, and the creation of the final examination. The petitioner also noted that the beneficiary was the liaison with developers at [REDACTED] Program, a governing body for the certification of mobile electronics installation specialists. The petitioner further indicated that the beneficiary managed the creative development of the online training web site including designing the web site, implementing the structural development of the online training web site using appropriate software, and planning and directing the initial set-up and coordination with the learning service provider, the host of the site responsible for security measures.

The petitioner added that the beneficiary spent: 21 percent of his time managing and maintaining both the U.S. and Canadian web sites, including managing updates, descriptions of the courses available, course schedules, and images of the facility; six percent of his time managing an employer resource web site offered to U.S. retail operations seeking new employees; one percent of his time as a liaison with the State Board in all matters pertaining to internet-based training; and, two percent of his time supporting the petitioner's efforts with a major retailer.

The petitioner provided the same organizational chart as previously provided.² The petitioner also indicated that the administrative assistant under the beneficiary's supervision was in charge of all student administration and the student database. The petitioner also listed the duties of the unfilled position of program developer under the beneficiary's supervision as "write programs, co-ordinate the outsourcing of computer related programming issues." The petitioner's Arizona Unemployment Tax and Wage Report for the quarter in which the petition was filed showed that the petitioner employed the beneficiary and the director of U.S. operations. The petitioner further provided an agreement with an employee leasing company dated August 2002, listing the employees the petitioner utilized and their dates of employment.

The director denied the petition on March 31, 2005, determining: that the petitioner had only one employee in addition to the beneficiary; that the beneficiary would be performing many of the day-to-day operations of the business; the description of the beneficiary's duties was broad and general; and some of the beneficiary's described duties had not been demonstrated to be managerial duties. The director noted additionally: that assuming the beneficiary's duties had been adequately detailed the beneficiary's responsibilities comprised duties or responsibilities for which the beneficiary primarily performed the task; that the evidence did not demonstrate that the beneficiary managed a staff of professional, managerial, or supervisory employees who

² The petitioner also provided a more current organizational chart (December 2004) that showed that the position of assistant program developer/instructor, now the beneficiary's only direct subordinate, had been filled. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's more recent organizational chart does not assist in establishing the beneficiary's managerial or executive capacity when the petition was filed.

relieved him of performing non-qualifying duties; and, that the evidence did not show that the beneficiary managed or directed the management of a department, subdivision, function, or component of the petitioning organization rather than performing the routine quality assurance operational activities of the entity.

On appeal, counsel asserts that a review of the beneficiary's job description makes clear that the beneficiary's position is managerial. Counsel claims that the petitioner's internet-based training program is an essential component of the petitioner's business, that the beneficiary manages clients' online needs and the expansion of the training program, as well as directly supervises other professional employees. Counsel notes that the beneficiary has the authority to hire and fire employees, functions at a senior level within the organizational hierarchy, and exercises discretion over the day-to-day operations of the activity or function for which he has authority. Counsel also contends that the beneficiary's position is executive in that he: directs the management of the organization, or a major component or function of the company; establishes the goals and policies of the organization, component, or function; as one of three owners exercises wide latitude in discretionary decision-making; and, receives only general supervision from higher level executives, the board of directors, or stockholders of the organization.

Counsel observes that the director's decision begins with uncompleted boilerplate language and questions whether the petitioner's evidence was adequately reviewed. Counsel also argues that the director improperly failed to consider or give any weight to the petitioner's substantial number (nine) of leased employees. Counsel notes that the petitioner utilized independent contractors, such as lawyers, accountants, and the employee leasing company. Counsel cites several unpublished decisions in which the AAO approved L-1A petitions filed by one-person U.S. offices as well as noting that the petitioner's number of employees is merely a factor to be considered when determining whether a position is managerial or executive and is not the determining factor. Counsel references a federal court decision holding that the size of a company is not determinative in an employment-based immigrant proceeding. Counsel also claims that the director violated agency policy by denying the immigrant petition after approving the beneficiary's L-1A intracompany transferee visa petition in February 2003 because the director made no reference to gross error in the previous approval and because there are no changed circumstances in the beneficiary's position with the petitioner.

Counsel's assertions are not persuasive. Preliminarily, the AAO observes that the director inserted a template of an opening paragraph in his decision and did not insert language identifying the petitioner. However, the decision clearly relates to the evidence in the record of proceeding and the director's decision, although not detailed, sufficiently apprises the petitioner of the deficiencies in the evidence. For example, the director notes that certain language found in the petitioner's description of the beneficiary's duties does not connote managerial capacity. The director also determined that the record demonstrated that the beneficiary performed many of the petitioner's routine operational tasks. The director's decision in this matter addresses the principal deficiency of this petition.

The petitioner's initial description of the beneficiary's duties as well as that of the more detailed description provided in response to the director's request for further evidence, indicates that the beneficiary is the individual performing the operational tasks associated with the petitioner's online internet training service. 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).

The petitioner's initial description of the beneficiary's duties indicates that he is responsible for overseeing the management and maintenance of the company's online presence, directing the development, implementation, and management of an employer's resource web site, directing the development, implementation, and management of an internet-based training program, and managing clients' online needs and the expansion of the internet training programs. Even though the petitioner claims that the beneficiary oversees, directs, and manages the activities associated with managing the petitioner's online training web site, the petitioner does not depict anyone on its organizational chart who would carry out the tasks necessary to operate the online training web site. 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)). Moreover, the petitioner's more detailed description of the beneficiary's duties in response to the director's request for evidence suggests that the beneficiary prepared the course materials and tests, designed the web site, maintained the web site using appropriate software, and served as a liaison with the host service provider. The actual duties themselves 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). 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 acknowledges that the petitioner indicates on its organizational chart that the beneficiary will receive assistance from a program developer in performing the tasks of the online operations department; however, the petitioner had not filled the assistant position when the petition was filed. Further, the petitioner's leasing company indicates that the individual ultimately responsible for assisting the beneficiary in the course of his duties was not hired until September 2004, a year after the petition was filed. As referenced earlier, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Contrary to counsel's claim, the description of the beneficiary's duties does not describe an individual whose duties comprise primarily managerial duties.

Counsel's contention that the beneficiary is a function manager is also not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. However, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In this matter, counsel indicates that the petitioner's internet-based training program is an essential component of the petitioner's business. Counsel, however, does not provide documentary evidence to establish the essential nature of this component of the petitioner's business, nor does counsel allocate the proportion of time the beneficiary spends managing the function. The AAO acknowledges that the petitioner indicated that the beneficiary spent 70 percent of his time overseeing the petitioner's online training program, but as observed above, the majority of the beneficiary's actual duties appear related to performing the operational tasks

associated with this function. The petitioner has not demonstrated that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel's assertion that the beneficiary's position is also an executive position is not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Further, the AAO finds that the general oversight of an organization or a component of an organization does not necessarily elevate a beneficiary's position to that of a manager or an executive. Again, it is the actual duties themselves that reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Counsel's citation to unpublished decisions is not probative. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. The petitioner is not a small one-person office. Rather, the petitioner employs two individuals directly and nine others through the use of an employee leasing company. In this matter, the petitioner has provided sufficient evidence to establish that it retains control over the leased employees and that the leased employees are considered working for the petitioner. The issue in this matter, however, is that when the petition was filed, the beneficiary only supervised an administrative assistant. The administrative assistant's job duties do not comprise duties that relieve the beneficiary from performing the operational tasks of the online operations department. 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 online operations business.

Counsel's citation to a federal court decision holding that the size of a company is not determinative is noted and the district court's decision has been given due consideration. The AAO acknowledges that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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's duties comprised primarily managerial or executive duties when the petition was filed. For this reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary's duties for the foreign entity consisted of primarily managerial or executive duties. The petitioner provided the same position description for the beneficiary's position with both the petitioner and the foreign entity. As discussed above, the description of the beneficiary's duties provided shows that the beneficiary was performing the necessary operational tasks to establish the petitioner's online training business. 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. The petitioner did not explain how the foreign entity's employees relieved the beneficiary from providing the foreign entity's operational tasks associated with its online business. For this additional reason, the petition will not be approved.

Further, the petitioner has not established a qualifying relationship with the foreign entity as defined in the regulations. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

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

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner in this matter claims it is affiliated with the foreign entity because the same three individuals own and control both the petitioner and the foreign entity. In this matter, the petitioner's director of operations owns 35 percent of the petitioner, the beneficiary owns 32.5 percent of the petitioner, and a third individual owns 32.5 percent of the petitioner. No single individual owns a majority interest. The petitioner's director of operations owns 40 percent of the foreign entity, the beneficiary owns 20 percent of the foreign entity, and a third individual owns 40 percent of the foreign entity. Again, no one individual owns a majority interest in the foreign entity. The petitioner and the foreign entity are not owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals

control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals in approximately the same share or proportion. Based on the evidence submitted, the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Finally, the AAO acknowledges that CIS approved the petitioner's initial Form I-129 nonimmigrant petition. With regard to the initial approval of the petitioner's Form I-129 nonimmigrant petition, the AAO also observes 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. at 1103. 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). 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 the previous nonimmigrant approval by denying the immigrant petition.

In addition, 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.