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[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 24 2006
SRC 04 140 51666

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:

[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 visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation operating as a wholesaler of prepaid telephone cards under the laws of the State of Texas. The petitioner seeks to employ the beneficiary as its finance manager.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; or (2) at the time the priority date was established, the petitioner had the ability to pay the beneficiary her proffered annual salary of \$28,000.

On appeal, counsel for the petitioner claims that the director's denial of the visa petition is erroneous as she did not consider the concept of "functional manager," a capacity in which counsel claims the beneficiary would be employed. Counsel notes that Citizenship and Immigration Services (CIS) ignored the regulatory requirement that the petitioner's stage of development be considered in addition to the size of its staffing levels. Counsel further claims that the petitioner demonstrated its ability to pay the beneficiary's proffered salary by providing copies of the beneficiary's prior paystubs, which reflect wages "slightly above the proffered wage," as well as through its bank statements, which counsel suggests reflect an average monthly balance above the beneficiary's proffered salary. Counsel submits an appellate brief in support of his assertions on 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 or 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, which 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.

The first issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the immigrant petition on April 20, 2004 noting that in addition to its four employees, the beneficiary would be employed as the corporation's finance manager. In an attached letter, dated April 5, 2004, the petitioner outlined the job duties to be performed by the beneficiary in her proposed position. The

beneficiary's job duties will be outlined below, as the petitioner's response to the director's notice of intent to deny included an allocation of time the beneficiary would devote to the proposed tasks. The petitioner submitted an organizational chart identifying the following four workers employed by the petitioner at the time of filing: president-chief executive officer, sales manager, accounts manager, and assistant sales manager. The petitioner noted on the organizational chart the proposed employment of the beneficiary and sales personnel. The petitioner attached a summary of the job duties performed by the four employees, as well as the beneficiary.

In a Notice of Intent to Deny, dated November 18, 2004, the director asked that the petitioner assign the percentage of time the beneficiary would dedicate to each named task, and clarify "who provides what product, sales and services of the business." The director also requested that the petitioner define the petitioner's workplace as a sales office, agency or distribution center, and explain the work performed by the petitioner's lower-level employees. The director noted that the beneficiary's proposed position "is not defined with clear separate duties" from those performed by the other employees.

In the petitioner's response, dated December 15, 2004, the petitioner's counsel provided the following outline of the beneficiary's proposed job duties as finance manager:

- Develop and direct major financial policies and formulate business strategies for [the petitioner]; [10%]
- Direct and coordinate activities to implement accounting and financial policies, procedures, and practices for [the petitioning entity]; [10%]
- Develop and implement financial plans for [the petitioning entity]; [10%]
- Confer with the management to determine its assets, liabilities, cash flow insurance coverage, tax status, and financial objectives; [10%]
- Analyze financial status of the company and develop financial plans based on analysis of data, and discuss financial operations with [the petitioner's] management team; [10%]
- Prepare and submit documents to implement plans selected by management of [the petitioning entity]; [10%]
- Revise plans based on modified needs of the company or the changes in the investment market; [5%]
- Direct, through subordinate supervisors, activities of workers engaged in implementing financial and accounting policies; [5%]
- Establish procedures for custody and control of assets, records and loan collateral to ensure safekeeping for [the petitioning entity]; [5%]
- Prepare financial and regulatory reports required by law, regulations, and the management team; [5%]
- Evaluate data pertaining to costs to plan budgets for [the petitioning entity]; [5%]
- Plan and develop methods and procedures for carrying out financial activities; [5%]
- Review activity reports and financial statements of all operations to determine progress and status attaining objectives and revise objectives and plans in accordance with current conditions; [5%]
- Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity of the corporations. [5%]

Counsel noted that the proposed sales assistants would perform the sales of the petitioner's telecommunication products.

Counsel emphasized the need for the beneficiary's proposed position, stating that it "is justified by the volume of business (over three million dollars), the need for subordinate [sic] oversight (of five subordinates), development and direction of telecommunication services *expansions*, and the fact that the President . . . has to divide his time with administering both parent and U.S. subsidiary." (Emphasis in original). In response to the director's request for clarification of the beneficiary's job duties, counsel stated that the beneficiary would direct the company's financial policies and would formulate its business expansion strategies, while the accounts manager would prepare and implement the company's budget and monitor accounting targets, and the sales manager would direct the petitioner's sales program. Counsel claimed that the above-addressed evidence demonstrated the beneficiary's proposed employment in an executive capacity.

In a June 10, 2005 decision, the director concluded that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity. The director stated that "[t]he beneficiary evidently exercises discretion over the day-to-day operations of the activity, but it must be noted that she is also performing some of the day to day duties of the business." The director concluded that the petitioning entity would not need a full-time employee in the beneficiary's proposed position "to manage two or three employees and to make decisions regarding the company." The director further noted that the beneficiary would not be primarily directing the management of the company, nor would the beneficiary primarily direct "a subordinate staff of professional, managerial, or supervisory personnel, who [would] relieve him from performing non-qualifying duties." Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on July 11, 2005. In a subsequently submitted appellate brief, counsel stresses CIS' erroneous reliance on the size of the petitioner's staffing levels in denying the requested classification. Counsel notes that the director disregarded the principle of "functional manager", and challenges that "[CIS] denied the Petition on the basis of a low employee count, irrespective of the financial figures (over \$2 million in gross sales for 2002 and nearly \$3.5 million in 2004) and the fact that the financial *function* required management." (Emphasis in original). Counsel contends that the director ignored the petitioner's "early stage of development," which counsel claims "[would] not require large staffing levels," and stated that when the petitioner's staffing levels "are properly acknowledged" the evidence demonstrates that the beneficiary would be managing the company's financial function. Counsel notes that the petitioner's employees do not require management, stating that "the nature of the calling card business [is] to derive large business from bulk sales to critical retailers and not from the individual retail sales of the calling cards, which would be labor intensive." Counsel references several cases, including *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988) as requiring that the petitioner's reasonable needs be considered in addition to the company's size when determining the beneficiary's employment capacity. Counsel also refers to an unpublished AAO decision in support of the proposition that a beneficiary may be considered to be serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel emphasizes that the appropriate review of the beneficiary's employment capacity requires consideration of the beneficiary's job duties in light of the petitioner's overall stage of development.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Counsel appropriately stresses on appeal the need to review the beneficiary's job duties when determining the beneficiary's employment capacity. As provided in the regulation at 8 C.F.R. § 204.5(j)(5), when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. Here, the job duties presented by the petitioner do not substantiate its claim that the beneficiary would be employed as a function manager.

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. 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 addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

The AAO emphasizes the requirement of specificity associated with the claim of employment as a function manager. See 8 C.F.R. § 204.5(j)(5). Other than counsel's claim on appeal that the beneficiary would be *managing* the company's financial function, there is no evidence in the record to support the finding that the beneficiary would not be primarily *performing* the financial operations of the United States business. Counsel's limited claim on appeal that the beneficiary's senior-level position in the company, during which she "manages the essential function of finance, and as corroborated her pay, . . . exercises discretion over the day-to-day operations of the financial activities," is not sufficient to demonstrate the beneficiary's employment as a function manager. Additionally, counsel's "common sense" argument that the petitioner's realization of "millions in gross sales" necessitates the employment of a worker who would manage its financial function does not overcome this requirement. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 25 (D.D.C. 1999) (requiring the petitioner to establish what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial or non-executive). The petitioner has failed to clarify such ambiguities as the "major financial policies" developed by the beneficiary, the "activities" coordinated by the beneficiary with regard to the company's accounting and financial policies, or the "workers engaged in the implementing financial and accounting policies." Additionally, the petitioner has not offered documentary evidence, such as its business plan, which would assist in ascertaining the specific business strategies to be formulated by the beneficiary. 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). The AAO notes that 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).

A careful review of the beneficiary's job duties indicates that the beneficiary would devote approximately 60 percent of her time to personally performing tasks related to the petitioner's finances. Specifically, the beneficiary would be personally involved in the development, implementation, and revision of the company's financial plans, and would perform such non-qualifying tasks as determining the company's "assets, liabilities, cash flow insurance coverage, tax status, and financial objectives," analyzing financial data with regard to the company's financial status, as well as "pertaining to costs to plan budgets," discussing "financial options" with the petitioner's management, and preparing "financial and regulatory reports" and documents requested by management. Based on the petitioner's representations, the beneficiary would be primarily performing the financial operations of the business, rather than "[e]xercis[ing] direction over the day-to-day operations of the . . . [financial] function." Section 101(a)(44)(A) of the Act. The minimal amount of time dedicated by the beneficiary to developing and directing the petitioner's financial policies and formulating business strategies is far outweighed by her analysis and interpretation of the petitioner's financial data and preparation of financial documents and reports, activities which are clearly deemed to be related to the petitioner's finances. 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).

Despite counsel's claim on appeal that the beneficiary would manage the financial *function* rather than the *personnel* of the corporation, the record does not reveal that the petitioner employs workers who would relieve the beneficiary from the performance of the above-mentioned non-managerial and non-executive tasks. Counsel correctly observes 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Based on the job descriptions of the beneficiary's subordinate employees, it does not appear that the accounts manager, sales manager, or assistant sales manager would assume the above-outlined non-managerial and non-executive tasks performed by the beneficiary, particularly the analysis of data, determination of assets and liabilities, projection of cash flow insurance coverage, tax status, and financial objectives, and the preparation of documents and financial and regulatory reports. The AAO notes that the beneficiary's job duties also appear to overlap with the tasks of the accounts manager, specifically in the area of "develop[ing] and implement[ing] financial plans for [the petitioner]." Each employee is represented as performing this task, yet the petitioner has failed to clarify the inconsistency. The AAO further notes that it is unclear from the record whether the petitioner employed the above-referenced workers at the time of filing. The petitioner's quarterly wage report for the second quarter of 2004 indicates that one worker was employed during April, the date during which the immigrant petition was filed. Based on the record, the AAO is unable to determine whom the petitioner employed as of the date of filing, as well as the related job duties. 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).

Additionally, taking into consideration the purpose and stage of development of the petitioner as a four year-old company operating as a wholesaler, it does not appear that the company's reasonable needs are met by the employment of the beneficiary, as well as the president, accounts manager, sales manager and assistant sales manager. Here, counsel states that sales personnel would be responsible for selling the petitioner's product, yet, at the time of filing, no sales representatives were employed by the petitioner. Additionally, as the beneficiary is clearly responsible for performing non-qualifying functions of the business, which have not otherwise been assumed by any of the lower-level employees, the petitioner does not employ a staff sufficient to support the beneficiary in a primarily managerial or executive capacity. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO will next consider the issue of whether at the time the priority date was established the petitioner had the ability to pay the beneficiary's proffered salary of \$28,000.

In her November 18, 2004 Notice of Intent to Deny, the director requested that the petitioner provide at least two of the following pieces of documentary evidence demonstrating its ability to pay the beneficiary her proffered salary: (1) copies of the petitioner's past six monthly bank statements; (2) a published annual report; (3) a substantiated annual profit and loss statement; or (4) an audit performed by a certified public accountant.

In a response dated December 15, 2004, the petitioner's counsel referenced a May 4, 2004 CIS memorandum as authority for establishing an ability to pay the proffered salary. Counsel stated that the petitioner demonstrated its ability to pay the proposed salary of \$28,000 through: (1) copies of the beneficiary's monthly paystubs, which reflect a salary "at slightly above the proffered wage"; and (2) the petitioner's bank statements, which indicate that the petitioner's monthly balance exceeded the beneficiary's monthly wages. Counsel noted that in addition to the petitioner's present ability to pay the beneficiary a salary of \$28,000, the company "has exhibited a pattern of increased financial results."

In her June 10, 2005 decision, the director concluded that the petitioner had not demonstrated its ability to pay the beneficiary's proposed annual salary. The director rejected the petitioner's bank statements as evidence of its ability to pay the beneficiary, stating that they do not reflect the petitioner's liabilities. The director stated that "[a]t the time the priority date was established, the petitioner did not show the ability to pay the proffered wage in its net profit nor in its assets over liabilities ratio." The director concluded that the petitioner could not afford to pay the beneficiary \$28,000 per year. Consequently, the director denied the petition.

On appeal, counsel challenges the director's finding that the petitioner could not pay the beneficiary's annual salary and questions CIS' competence "to conduct accounting audits that second-guess the business judgment of the Petitioner." Counsel again references the 2004 CIS memorandum, stating that the petitioner satisfied two of the requirements outlined in the memorandum for establishing the ability to pay, specifically through paystubs and bank statements. Counsel also contends that a "totality" approach, adopted in *O'Conner v. Attorney General*, 1987 WL 18243 (D.Mass.), requires an analysis of the petitioner's "entire financial

resources" in order to verify its ability to pay. Counsel states that the petitioner "has exhibited a pattern of increased financial resources."

Counsel rejects the director's "assets over liabilities ratio" as a factor in determining the company's ability to pay the beneficiary's salary, stating that neither the 2004 CIS memorandum nor the Code of Federal Regulations address this analysis. Counsel also stresses the purpose behind the "ability to pay" requirement, stating that "[it is] only meant to present a mechanism for assessing whether the Petitioner and its proffered position as 'bona fide'," and contends that CIS should not apply a "hyper analytical" analysis to the requirement.

Upon review, the petitioner has established that it had the ability to pay the beneficiary her proffered salary of \$28,000 at the time the priority date was established.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the beneficiary was not employed by the petitioner at the time the priority date was established. As a result, the petitioner did not establish that it had previously employed the beneficiary at the proposed salary. However, a review of the paystips submitted by the petitioner in its response to the director's notice of intent to deny demonstrate that the petitioner has been paying the beneficiary her proffered wages of \$2,400 per month since her employment with the company in August 2004. Additionally, the petitioner's bank statement for the period ending April 30, 2004, the period during which the priority date for the instant petition was established, reflects an available balance in the petitioner's checking account sufficient to pay the beneficiary's monthly wages. As a result, the petitioner demonstrated its ability to pay the beneficiary her proffered annual salary. Accordingly, the director's decision with regard to this issue only will be withdrawn.

Beyond the decision of the director, an additional issue is whether the petitioner demonstrated that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner failed to document what proportion of the beneficiary's duties were managerial functions and what proportion were non-managerial. The absence of this documentation is important because several of the beneficiary's daily tasks, such as analyzing financial data in order to recommend financial options and prepare the company's budget, revising investment plans according to the needs of the company, preparing and submitting "documents" to management, completing financial and regulatory reports, and meeting with management in order to ascertain the company's financial status and needs regarding cash flow insurance coverage, do not fall directly under traditional managerial duties as defined in the statute. The beneficiary's role in the financial operations of the company, rather than merely managing the financial function, is further support by her responsibility of formulating plans in order to increase the company's profit margin. The petitioner's outline of the job duties performed by the beneficiary in her position as finance executive demonstrates that the beneficiary was personally responsible for performing the day-to-day finance functions of the foreign corporation. The AAO also notes that while the petitioner stated that the beneficiary directed financial activities through subordinate supervisors, the petitioner did not provide an organizational chart or other documentary evidence identifying the beneficiary's subordinates and confirming their performance of the company's day-to-day finance operations. 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)). For this reason, the AAO cannot determine whether the beneficiary was employed in a primarily managerial or executive capacity. Accordingly, the petition will be denied for this additional reason.

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).

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.