

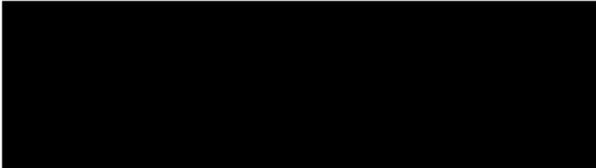
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship and Immigration Services

**PUBLIC COPY**



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FILE: EAC 05 224 53311 Office: NEBRASKA SERVICE CENTER Date: OCT 09 2007

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York corporation operating as an international shipping and freight forwarding service provider. It seeks to employ the beneficiary as the route manager of its French/U.S. division. 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 denied the petition based on two independent grounds: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief in support of his arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 two primary issues in this proceeding call for an analysis of the beneficiary's job duties. The first issue calls for an analysis of the beneficiary's job duties during his employment abroad.

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 support of the Form I-140, the petitioner submitted a letter dated August 5, 2005 in which the petitioner provided the following statements about the beneficiary's foreign position as senior sales executive:

[The beneficiary] was responsible for developing overall plans, setting goals and developing operational management procedures involving [the petitioner]'s international transportation services, in accordance with company procedures and client-driven methodologies, for all U[.]S[.]A[.]-France import/export sales and service for [the] pharmaceutical industry clients. He met with existing clients on a regular basis to insure their satisfaction with [the petitioner]'s services, and with potential clients to acquire their transportation and shipping business. He was in constant contact with [the petitioner]'s offices outside of France to keep

them up-to-date on established and prospective clients, as well as following-up on leads sent to him. He was also responsible for developing new France/U[.]S[.]A[.]U[.]S[.]A[.]France routes for our pharmaceutical industry clients.

On June 21, 2006, the director issued a request for additional evidence (RFE) addressing, in part, the issue of the beneficiary's employment abroad. In that regard, the petitioner was instructed to provide a specific list of the beneficiary's actual daily tasks and to attribute a percentage of time that was allotted to each task. The petitioner was also asked to provide additional information about the duties of the beneficiary's supervisors as well as his subordinates, if any.

In response, the petitioner submitted a letter dated August 25, 2006 in which the following percentage breakdown was provided:

- **Development of overall plans: 5%**

Oversaw sales orientations and priorities in the interest of the growth of the department. Reviewed sales prospect information to be visited/obtained in accordance with the orientation and priorities of the department. Monthly meetings and discussions were held with [the petitioner's] management to determine if priorities were set correctly and if they conformed to the expectations of [the petitioner's] French clients and the [petitioner's] organization. Weekly and monthly general reviews and meetings were held to maintain company standards.

- **Setting goals and developing operational management procedures: 6%**

Determined yearly targets and appropriate operational implementation to achieve those. Oversaw weekly and monthly sales reports to [the petitioner's] management to showing [sic] the actual and potential growth of the company, as well as daily sales report to maintain data of all current and prospective clients. Oversaw monthly meetings to review and nominate the key operation people for each French client. Oversaw the creation and review of quality control processes to match exactly the requirements of [the petitioner's] French clients.

- **Meeting with existing clients on [a] regular basis: 27%<sup>1</sup>**

- **Meeting with potential clients to acquire their transportation [and] shipping business: 31%<sup>2</sup>**

- **Constant contact with [the petitioner]'s offices outside of France: 15%**

Advised the [petitioner's] network of all mid-term developments. Oversaw the exchange of information with [the petitioner] regarding the requirements of our current and prospective . . . clients. Oversaw daily conference calls with the regular trips to [the petitioner's] offices

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<sup>1</sup> This portion of the job description has been restated, verbatim, by the director and, therefore, need not be repeated.

<sup>2</sup> This portion of the job description has also been restated by the director and, therefore, need not be repeated.

to reinforce the unity of the [petitioner's] Group. Sent information on possible client leads to the [petitioner's] network to generate new business on the U[.]S[.] side.

- **Follow-up on leads: 5%**

Oversaw and followed-up on sales calls and visits to both current and prospective clients (information generated and sent by the [petitioner's] network), in order to increase the client base and bring in new business.

- **Developed France/U[.]S[.]A[.]U[.]S[.]A[.]France routes for the [p]harmaceutical [i]ndustry: 11%**

\* \* \*

On a daily basis, oversaw the review and contacting of healthcare and pharmaceutical companies from various listings to evaluate them and try to arrange meetings in order to develop and negotiate new routes.

The petitioner also provided the foreign entity's organizational chart showing that the beneficiary had two subordinate employees—one import and one export coordinator. Each individual's responsibilities included maintaining existing accounts, being in charge of proposals, and ensuring customer satisfaction with the services provided by the foreign entity. Although the petitioner also stated that the coordinators oversee the operations department, the organizational chart provided does not include such a department.

On December 30, 2006, the director denied the Form I-140, concluding that the beneficiary was not employed abroad in a qualifying managerial or executive capacity. More specifically, the director focused on the beneficiary's client-related duties and determined that more than half of the beneficiary's time was allocated to directly dealing with the company's clientele.

On appeal, counsel objects to the director's conclusion, asserting that the beneficiary's customer-related duties are in large part oversight duties, which did not require the beneficiary to actually carry out non-qualifying tasks. However, 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 Obaighbena*, 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). Thus, counsel's focus on the beneficiary's purported oversight duties merely suggests that the beneficiary may have been either a function or a personnel manager. However, further explanation and documentation would be required for either claim. Namely, if claiming that the beneficiary oversaw the work of others, section 101(a)(44)(A)(ii) of the Act states that the subordinates must have been supervisory, professional, or managerial employees. In the present matter, the petitioner's prior brief job descriptions of the beneficiary's subordinates suggest that they may have acted in supervisory roles. However, neither the organizational chart provided nor the job descriptions of the beneficiary's subordinates provide sufficient information that would lead to the conclusion that they were supervisory or managerial employees.

In the alternate, if counsel means to suggest that the beneficiary managed an essential function during his employment abroad, the petitioner would have to provide a clearer explanation as to who performs the duties associated with that function such that the beneficiary is actually managing the function rather than

performing those non-qualifying duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the present matter, the petitioner failed to provide an explanation of the specific duties that comprised the function the beneficiary purportedly oversaw, nor did the petitioner explain who carried out the non-qualifying tasks. Without this necessary information and without further statements explaining how the beneficiary's client-related tasks amounted to the management of a function or the supervision of personnel, the AAO cannot conclude that the beneficiary's tasks abroad were primarily within a qualifying capacity. Contrary to counsel's assertion, the mere fact that the director only recited two components of the job description provided in response to the RFE does not indicate that all other relevant information was ignored. The director clearly established that the two components that comprised the majority of the beneficiary's time were not, in fact, of a qualifying nature. Based on this determination, any further discussion of the remaining components would not have altered the overall adverse conclusion. The director was reasonable in limiting his discussion to those portions of the job description he deemed most relevant in contributing to his adverse findings.

With regard to the beneficiary's proposed job duties, the petitioner provided the following description in the initial support letter dated August 5, 2005:

[The beneficiary] is in charge of the setup and organization of the U[.]S[.]A[.]France [s]ales [d]epartment. Specifically, [he] is responsible for the promotion of sales of freight forwarding services from New York and other northeast U[.]S[.] destinations as well as exports to France from the New York market area. He plans and develops the sales operations of the international transportation and freight forwarding activities of the New York office, and develops overall plans, sets goals and develops sales management procedures involving our international transportation services, in accordance with company procedures.

In addition to the above, [the beneficiary] directs the New York office's U[.]S[.]A[.]France activities, including sales management, client servicing, pricing and project budgeting operations. He confers with our major clients, suppliers, and buyers, as well as [the petitioner]'s international management and services the network concerning purchase orders, product specifications, payment and delivery terms and schedules. He negotiates contractual terms relative to our multi-party/multi-origin/multi-destination transactions and is in regular communication with our clients, suppliers, buyers, and [the petitioner's] personnel worldwide to ensure the accurate, timely, efficient and cost-effective implementation of our clients' orders, which are valued in the millions of dollars.

After reviewing this information, the director determined that additional information and documentation was necessary. Accordingly, in the RFE, the director instructed the petitioner to provide a more detailed description of the beneficiary's proposed position in the United States, including the beneficiary's specific daily tasks and the percentage of time allotted to each task. The director also instructed the petitioner to provide the W-2 statements issued to its employees in 2005 as well as its tax returns for 2004 and 2005. The director noted that the organizational chart submitted in support of the Form I-140 shows that the beneficiary

has no subordinate employees. As such, the director instructed the petitioner to provide detailed job descriptions of the beneficiary's two direct superiors—the department manager and the branch manager.

In response, the petitioner provided the following description of the beneficiary's proposed position within the U.S. entity:

- **Setup and organization of the U[.]S[.]A[.]—France [s]ales [d]epartment: 10%**

Define sales directions and priorities for [the petitioner]'s New York sales office . . . . Coordinate sales activities of the France/U[.]S[.]A[.]—U[.]S[.]A[.]—France route. Conduct monthly meetings with sales staff to review sales and operational decisions in conformity with company standards. Oversee the hiring of new sales staff members . . . . Oversee weekly sales meetings to evaluate the evolution and success of the France/U[.]S[.]A[.]—U[.]S[.]A[.]—France sales team.

- **Promote sales of freight forwarding services for New York and other northeast U[.]S[.] destinations and exports to France from the New York area: 21%**

Oversee conference calls and visits with French prospective clients and propose them our international transportation service between France and the U[.]S. Oversee weekly analyses of promotional efforts to improve our capabilities of obtaining French companies exporting to or from the U[.]S[.] . . . . Oversee [the petitioner]'s participation with targeted trade associations and trade shows.

- **Plan and develop and sales operations of the international transportation and freight forwarding activities of the N[.]Y[.] office: 8%**

Oversee the detailed elaboration for each French client of [the petitioner]'s processes as each client has its own specifications and products. These processes must be conformance with both the client's requirements and the [petitioner's] network, and must be reviewed on a regular basis to emphasize our specialization in international transportation to and from France. Insure that clients receive dedicated solutions especially made for each of their specifications (rates, products, timeframe, peak season, etc). These quality processes/proposals are sent to current and prospective clients on a daily basis to obtain more business and develop our strength . . . .

- **Develop overall plans: 5%**

In collaboration with the French network, plan the yearly sales orientations and priorities in the interest of the growth of the France/U[.]S[.]A[.]—U[.]S[.]A[.]—France route. Potential sales leads must be generated not only by the New York office, but also by [the petitioner]'s French network . . . . Analyze route budget and targets to identify areas in which improvement can be made; generate and exchange that information between France and New York on a daily basis. Oversee monthly meetings and discussions with [the petitioner's] management [in France] to determine if priorities are set correctly and if they correspond with the standards and policies of [the petitioner].

- **Set goals and develop sales management procedures involving our international transportation services: 6%**

Oversee the calculation and creation of sales targets as well as the necessary operational processes to maintain a high quality of services. Review weekly and monthly sales reports to demonstrate . . . growth of the company. Oversee monthly meetings with [the petitioner's] French management to assess the performance of and reassign key operations people for each task of each client. Quality processes are reviewed constantly to match exactly the specific requirements of the clients and the [petitioner]. Oversee the creation and development of statistics tools to qualify and quantify the sales activities of the department.

- **Direct the New York office's U[.]S[.]A[.]/France activities: 12%**

Oversee the consolidation and reporting of sales figures of the France/U[.]S[.]A[.]-U[.]S[.]A[.]/France route on a monthly basis to French upper management. Conduct daily conference calls and trips to discuss and analyze those subjects on a regular basis.

- **Sales management: 7%**

The regular sales reports are also made to evaluate the activity of each individual working in the sales department. Discussions are held on [a] daily basis in the best interest and to better serve the clients on the France/U[.]S[.]A[.]-U[.]S[.]A[.]/France route. Sales-operation meetings are also conducted to insure that each department (sales and operations) are [sic] listening to and understanding each other in the best interest of [the petitioner's] France/U[.]S[.]A[.]-U[.]S[.]A[.]/France clients.

- **Pricing: 10%**

After each meeting with current and prospective clients, proposals are submitted according to the details of the traffic given by them to illustrate and quantify the service solution that [the petitioner] ha[s] chosen for each one of them. Each proposal [and] quality process for [the petitioner's] French clientele is carefully calculated and reviewed to secure [their] business. This process is crucial to the future development of [the] client base. Most of the time[,] each proposal is made through [the petitioner's] sales management system, which is used on a daily basis for reporting [and] pricing. [The beneficiary] oversees the entire process.

- **Project budgeting operations: 4%**

This duty is linked to the one above. Evaluating and projecting the cost of operations to the company is as important as the proposal to the client. Monthly reports are created to ensure the transparency of [the petitioner's] costs, which enables us to make more competitive offers to [its] current and prospective clients. Meetings with international management are held to improve [the petitioner's] margin and the service provided to [its] clientele. Weekly

reviews are conducted for each supplier to make sure they are competitive and appropriate to each client.

- **Confer with major clients, suppliers and buyers, as well as [the petitioner's] international management: 10%**

Conduct regular meetings and calls with clients, suppliers and buyers to insure their satisfaction with the services provided. By insuring the loyalty of [the petitioner's] French clients, the company can grow and in turn obtain better pricing from [its] suppliers . . . . Conduct regular meetings with [the petitioner]'s international management . . . .

- **Service the network concerning PO, product specifications, payments, delivery term & schedules: 2%**

[The beneficiary] monitors accounts receivable and oversees coordinated efforts to collect overdue amounts through visits, calls, [and] trips to collect checks, etc. This process is carefully reviewed with each client and must be agreed [upon by] both sides.

- **Negotiate terms relative to our multi-party/multi-origin/multi-destination transactions: 2%**

[The beneficiary] maintains and oversees daily correlation and communications between [the petitioner's] offices to insure the efficiency of operations at the lowest possible cost to the company.

- **Maintain communication with clients, suppliers and buyers, as well as [the petitioner's] personnel worldwide: 3%**

In the area of international transportation services, negotiations with clients and service providers . . . must be carefully coordinated. . . . The satisfaction of [the petitioner's] clients depends not only on pricing of [its] services but also on [its] abilities in communicating with [the petitioner]'s international network. [The beneficiary] oversees and takes part in daily conferences, meeting calls, and trips to maintain and insure that stability.

The petitioner further stated that the beneficiary has two direct subordinates in the United States. One of his subordinates assumes the position of the France customer service manager, which includes communicating with the French network to ensure appropriate actions are taken on behalf of each client and communicating with the petitioner's French clientele on a daily basis to ensure their satisfaction. The petitioner stated that the beneficiary's second subordinate assumes the position of inside sales manager for France, which also includes communicating with the French network regarding sales operations, ensuring the satisfaction of French customers importing goods into the United States, and conducting meetings with prospective clients. As noted by the director in the denial, the petitioner provided 2005 W-2 statements for the beneficiary and for the France customer service manager. However, similar documentation was not provided for the inside sales manager position. It is further noted that the W-2 statement for the France customer service manager shows total earnings of \$6,038.46, which suggest either 1) that this individual was not employed with the petitioner on a full-time basis; or 2) that this individual was not employed with the petitioner for the full 2005 tax year.

If the latter is true, there is no documentation establishing that this individual was employed with the petitioner at the time the Form I-140 was filed.

In light of the evidence and documentation provided, the director determined that the petitioner failed to establish that it was sufficiently staffed to relieve the beneficiary from having to primarily engage in the daily sales activity, which are tasks of a non-qualifying nature. As such, counsel's argument that the director failed to specify the basis for his conclusion lacks merit.

Counsel then goes on to restate the petitioner's complete breakdown of the beneficiary's proposed responsibilities and the percentage of time allotted to each one. In re-evaluating the job description provided, the AAO notes that more than 50% of the beneficiary's time is allotted to oversight duties, which suggests that someone other than the beneficiary actually hires sales staff, handles conference calls, promotes the petitioner's services, confers with the petitioner's clientele, reports the sales figures, generates sales reports, writes up sales proposals after meeting with clients, and meets with the petitioner's clients, suppliers and buyers. As such, the director properly commented on the petitioner's failure to submit adequate documentation establishing who, if not the beneficiary, actually performs these essential, yet non-qualifying, tasks. Simply reiterating the beneficiary's job description and providing assurances of the petitioner's counsel as to the validity of the beneficiary's managerial role with the U.S. entity is not sufficient, as 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 Obaighena*, 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). While the petitioner's attempt to comply with 8 C.F.R. § 204.5(j)(5) by providing a detailed job description is acknowledged, the job description must be supported by other evidence, as the description itself cannot be deemed evidence of the duties actually performed. In the present matter, in light of the lack of sufficient documentation establishing the employment of a support staff that performs the petitioner's non-qualifying tasks, the AAO cannot conclude that the beneficiary would be relieved from primarily performing non-qualifying tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the petitioner has failed to establish that the beneficiary's proposed position in the United States would consist primarily of tasks that are within a qualifying managerial or executive capacity, the petition cannot be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." Although the petitioner has supplemented the record with balance sheets, financial statements, and tax returns, these documents cannot be relied upon to determine whether an entity is conducting business on a "regular, systematic, and continuous" basis. See *id.* Based on the information provided concerning the nature of the petitioner's business, the sales of shipping and freight forwarding services would typically generate sales invoices. Such documentation, however, has not been provided in the present matter. As such, the AAO can neither determine that the petitioner was doing business for

one year prior to filing its Form I-140 or is currently engaged in providing its services as required by the regulations.

Second, in order to warrant classification as a multinational entity, it is essential for the petitioner to establish that it conducts business in two or more countries, one of which is the United States. *See* 8 C.F.R. § 204.5(j)(2) (for definition of *multinational*). In the present matter, the record also lacks evidence establishing that at the time the Form I-140 was filed, the foreign entity had been engaged in the "regular, systematic, and continuous" provision of goods and/or services. *See id.*

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). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.