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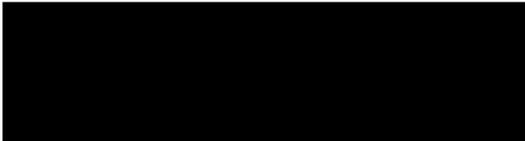
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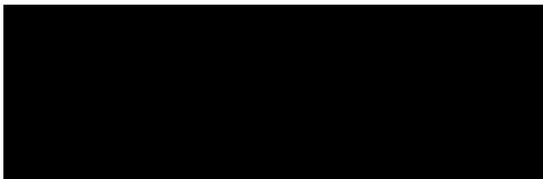
Petitioner:

Beneficiary:



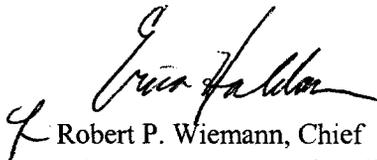
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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 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 immigrant visa 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 organized under the laws of the State of Florida that initially represented itself as an importer and exporter of automobile products. The petitioner subsequently indicated a change in its business operations in the United States, noting that it would operate as a sign painting business and would provide management to a purportedly related auto body business. The petitioner seeks to employ the beneficiary as its marketing director.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that when reviewing the beneficiary's eligibility for classification as a multinational manager or executive the director applied a standard that was eliminated under the Immigration Act of 1990, which resulted in the director's failure to consider the beneficiary's employment as a function manager. Counsel submits a brief in support of the appeal.

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

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives 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 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 Form I-140 on February 7, 2006, on which the beneficiary's proposed position was identified as marketing director, during which he would perform "[a]ll duties of a marketing director." Other than providing an undated letter confirming the beneficiary's appointment as the company's marketing director, the petitioner did not submit evidence documenting or describing the beneficiary's proposed employment.

On August 23, 2006, the director issued a request for evidence directing the petitioner to submit a statement describing the beneficiary's proposed position, including: (1) his position title; (2) job duties and the percentage of time the beneficiary would devote to performing each; (3) the subordinate managers, supervisors, or lower-level employees supervised by the beneficiary, as well as a brief description of their job titles, job duties, and educational levels; (4) the qualifications needed to perform in the beneficiary's position; (5) the level of authority held by the beneficiary and whether the beneficiary functions at a senior level in the organization; and (6) clarification as to who provides the services offered by the petitioner. The director also requested that the petitioner identify the beneficiary's position within the corporation's organizational hierarchy.

Counsel for the petitioner responded in a letter dated November 16, 2006, explaining that the beneficiary would occupy the position of manager in the petitioning entity, during which he would manage both the petitioning organization, which was identified as doing business as "Ace Custom Signs," a sign painting business, and the United States company "L&S Autobody, LLC," which counsel represented as an affiliate of the petitioner.

In a separate statement from the petitioner, the beneficiary's proposed position was identified as operations manager. The beneficiary was again represented as managing, directing, and coordinating the petitioner's operations, and directing the development of L&S Autobody, LLC. The petitioner indicated that the beneficiary would allocate his time among the following tasks: formulating marketing strategies, 10%; managing daily operations, 80%; and planning for business development, 10%. The beneficiary was identified as supervising three to four subordinate workers who would "execute signs for installation on automotive vehicles," repair automobiles, and sell automotive parts. The AAO notes that on its first quarter Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return for 2006, the petitioner noted the employment of one worker.

In a decision dated February 28, 2007, the director determined that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director indicated that following her request for evidence a notice of intent to deny was mailed to the petitioner noting that the previously offered job description was vague and requested additional detail of the beneficiary's job duties. While the notice of intent to deny and counsel's response are not part of the record of proceeding¹, the director outlined in her decision the following response from the petitioner:

[The beneficiary] directs and coordinates the company's financial and budget operations to maximize the investment of money and time to increase efficiency. He plans objectives and activities of both the sign business and the auto body business and coordinates the activities of the two companies. As the overall operations manager of the businesses, he is responsible for formulating marketing strategies, managing daily operations, supervising workers, and planning for business development. There is no other manager or individual serving in an executive capacity in the United States. The Beneficiary is therefore a functional manager, supervising the function of coordinating and developing the sign business and the automotive business.

¹ Counsel does not contest that the director mailed to the petitioner a notice of intent to deny or the content of his response.

The director also acknowledged the petitioner's representation of a four-person workforce, one of which was employed full-time. The director noted that of the three remaining employees, two worked two afternoons a week, while the third employee worked only on weekends.

The director instructed that to be considered a manager or executive, the petitioner must demonstrate that the beneficiary's duties relate primarily to operational or policy management of the petitioning organization, and do not involve such operational activities as "choosing suppliers, ensuring that the correct amount of product is received, review[ing] inventory levels, analyz[ing] market and delivery systems to assess if material availability [sic] and other day-to-day operational duties listed by the petitioner." The director concluded that while the beneficiary would exercise discretion over the company's day-to-day operations, he would also perform day-to-day duties of the business. The director stated: "It is reasonable to assume that this business does not need a full[-]time executive to manage three part-time employees and one full-time employee to make decisions regarding the company." The director further stated that the petitioner had not established the beneficiary's primary assignment as directing the management of the organization or supervising a subordinate staff who would relieve him from performing non-qualifying tasks of the United States business. Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal on April 2, 2007. In an attached appellate brief, dated March 30, 2007, counsel contends that the director failed to consider the petitioner's operations "in the area of sign painting, automobile body repair, automobile repair and sales of parts," and instead considered the petitioner's originally intended form of business as an importer and exporter. Counsel claims that this distinction is important "to underscore that the petitioner is not trying to prove L-1 ability based on qualifications to manage, supervise or execute an import and export business."

Counsel recognizes that other than the beneficiary, the petitioner does not employ any full-time employees, claiming that this "supports the petitioner's contention that the beneficiary is managing the business full-time since there is nobody else to manage it." Counsel distinguishes the definitions of manager and executive prior to the enactment of the Immigration Act of 1990 from the current statutory definitions, stating that the Immigration Act of 1990 recognized that an individual who manages or directs the management of a major function of a petitioning organization, but does not directly supervise lower-level employees, may qualify as a manager. Counsel states that as the only employee of the petitioning entity, the beneficiary is "solely responsible to develop and expand the business in the United States" and is "also acting as a manager of the business function and contracting workers to perform the duties of the business." Counsel cites an unpublished AAO decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee, and further contends that the beneficiary has satisfied the "test" suggested by the American Immigration Lawyers Association, which counsel notes includes the following considerations with respect to the beneficiary's employment: authority over the function; budgetary authority; contract authority; working at a senior level in the organization in relation to the function; strategic decision making; significant effect on company's profits, products and/or operations; management of direct and/or indirect reports; and exercise of discretion in managing day-to-day operations.

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

The AAO notes that the petitioner's claim of the beneficiary's managerial or executive employment in its response to the director's request for evidence is based on changes in the position originally offered to the beneficiary at the time of filing. Specifically, as conceded by counsel, at the time of filing, the petitioner intended to employ the beneficiary as the marketing director of its import and export business. Additionally, the auto body shop was not organized in the United States until September 8, 2006, or approximately seven months after the instant immigrant petition was filed. There is no evidence that the beneficiary's original title of marketing director should be considered as including any of the job duties related to the sign painting or the auto body businesses. When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. 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). Therefore, the analysis of the instant issue will be based on the representations initially made at the time of filing.

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 evidence presented by the petitioner at the time of filing is not sufficient to establish the beneficiary's proposed employment in a primarily managerial or executive capacity. The limited job description is contained on the Form I-140, on which the petitioner noted that the beneficiary would be employed as its marketing director and would perform "[a]ll duties of a marketing director." Pursuant to the regulation at 8 C.F.R. § 204.5(j)(5), the petitioner is obligated to submit with the filing of the Form I-140 a letter clearly describing the managerial or executive job duties to be performed by the beneficiary. The petitioner's brief claim does not satisfy this regulatory requirement. 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)). 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). Absent additional evidence of the tasks to be performed by the beneficiary as the company's marketing director, the AAO cannot conclude that the position offered to the beneficiary at the time of filing the immigrant visa petition would be primarily managerial or executive in nature. Accordingly, the appeal will be dismissed on this basis alone.

The AAO notes that even if it were to consider the beneficiary's role as the petitioner's operations manager, the record falls short of establishing employment in a primarily managerial or executive capacity. The beneficiary was represented as devoting 80 percent of his time to managing the company's daily operations, while dividing the remainder of his time between formulating marketing strategies and developing the business. According to the director in her February 28, 2007 decision, the petitioner indicated in its response to the director's notice of intent to deny that the beneficiary's additional job duties would relate to the company's financial and budget functions, and that the beneficiary would plan objectives, manage daily operations, and supervise workers. These extremely brief and overly broad representations do not clarify the specific managerial or executive job duties to be performed by the beneficiary. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, at 1108.

Counsel's claim that the beneficiary would be employed by the petitioner as a function manager is not persuasive. Counsel states that the Immigration Act of 1990 relaxed the statutory requirements for "manager" and "executive" in that it recognized that a beneficiary who does not possess supervisory responsibilities but who manages an essential function of the organization may qualify for either classification.

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).

Moreover, despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. Accordingly, with respect to the concept of function manager, 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.

In the instant matter, counsel's suggestion of the beneficiary's employment as function manager is based solely on the argument that as the sole employee of the United States company the beneficiary is the only worker available to manage and direct the operations of the business. Other than acknowledging that "[t]here is no one else available to perform managerial functions in the U.S.," counsel does not address how the beneficiary's employment would satisfy the regulatory requirements of function manager discussed above. Without additional evidence of the specific and essential function to be managed by the beneficiary and the daily job duties associated with the management of this function, the AAO cannot be expected to accept the petitioner's blanket claim of employing the beneficiary as a function manager. 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).

Of particular relevance to the petitioner's claim is the fact, which was repeatedly conceded to by counsel, that the beneficiary is the sole employee of the petitioning organization. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses, and recognizes that a beneficiary, as the sole employee of a petitioning organization, may qualify as a manager or executive. However, the AAO has consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive job duties and that the beneficiary would not be responsible for primarily performing the non-managerial and non-executive functions essential to the operation of the United States business.

Here, counsel does not clarify who would be responsible for the performance of the petitioner's non-qualifying functions if not the beneficiary. As noted by the director in her February 28, 2007 decision, it appears that at the time of filing, the petitioner employed four workers, only one of which worked on a full-time basis. Two of the four employees worked two afternoons per week, while the fourth employee worked only on weekends. On appeal, however, counsel denies the petitioner's employment of any one other than the beneficiary, repeatedly stating that the beneficiary is the only employee. As the response to the director's notice of intent to deny is not part of the record, the AAO cannot confirm the petitioner's staffing levels on the date of filing. 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).

Nonetheless, based on counsel's statements on appeal, it appears that the beneficiary would not be relieved from performing the day-to-day operational, logistical, financial, or administrative functions of the business. While counsel correctly suggests that the concept of function manager recognizes the use of outside independent contractors, and does not require the petitioner to employ a subordinate staff of a certain size, counsel has not specifically identified any outside contract workers who would relieve the beneficiary from performing the petitioner's non-managerial and non-executive functions. Rather, counsel primarily focuses on guidelines suggested by the American Immigration Lawyers Association as the "test" for employment as a function manager, claiming that the beneficiary has satisfied each criterion.

The AAO emphasizes that the regulation at 8 C.F.R. § 204.5(j)(2) clearly outlines the "test" for function manager, requiring that the petitioner demonstrate that the beneficiary's assignment within the United States organization primarily encompasses the following: (1) management of the organization, or a department, subdivision, function, or component of the organization; (2) management of an essential function with the organization, or a department or subdivision of the organization; (3) functioning at a senior level within the organizational hierarchy or with respect to the function managed; and (4) exercising discretion over the day-to-day operations of the activity or function for which the employee has authority. It is not enough for the petitioner to merely repeat or paraphrase the language of the statute or regulations in support of the function manager claim. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Contrary to counsel's claim on appeal, the petitioner has not provided evidence "detailing that the beneficiary directs an essential function at a senior level, and that there are personnel (or independent contractors) who will actually execute the duties." Again, 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. at 534.

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.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

The beneficiary was identified as having occupied the positions of operations manager and marketing manager in the foreign entity, during which he: assigned jobs to his approximately six subordinate employees and apprentices; monitored job performance; directed the sales and inventory functions; developed pricing strategies; and developed business. The subordinates' job duties were identified as repairing automobiles and selling automotive parts. Based on these brief representations, it appears that while the beneficiary may have been directing the work of subordinates, at least a portion of his time was devoted to performing day-to-day tasks related to the foreign company's sales, inventory, pricing and marketing functions. The beneficiary cannot be considered to have directed or managed these functions without evidence that the foreign entity employed subordinate workers who were personally responsible for the performance of the related tasks. As noted, the job duties of the beneficiary's subordinates were limited to repairing automobiles and selling automotive parts. The AAO notes that 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). The record as presently constituted does not demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the petition will be denied.

An additional issue not addressed by the director is whether the petitioner and the beneficiary's foreign employer possessed a qualifying relationship at the time of filing the immigrant visa petition.

To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e. a United States entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

Following the director's request for evidence of the existence of a qualifying relationship, counsel for the petitioner represented the existence of an affiliate relationship between the foreign and United States entities based on the purported ownership of both organizations by [REDACTED]. As evidence of Mr. [REDACTED] ownership of the foreign entity, counsel submitted a certificate of registration, which confirmed that [REDACTED] had registered the foreign entity's name in Trinidad and Tobago. With respect to the petitioning entity, counsel provided, among other documents, a copy of stock certificate number two, dated November 14, 2006, naming [REDACTED] as the owner of the petitioner's 2,000 authorized shares of stock. An attached document, titled "Stock Power," indicated that on the same date, the beneficiary of the instant petition, who was the original owner of the petitioner's stock, had transferred the entire amount of his shares to [REDACTED].

The petitioner has failed to demonstrate the existence of the requisite qualifying relationship between the foreign and United States entities at the time of filing. The AAO notes that without additional evidence in the form of a stock certificate or corporate documentation, the Certificate of Registration submitted with respect to the ownership of the foreign entity is not sufficient to establish [REDACTED] as owning and controlling the foreign organization. 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)).

Nonetheless, even if the AAO were to consider [REDACTED] the owner of the foreign entity, the record does not demonstrate his purported ownership and control of the petitioning entity at the time of filing. The AAO emphasizes the requirement that the petitioner demonstrate its eligibility for the requested immigrant visa petition at the time the petition is filed. *See Matter of Katigbak*, 14 I&N Dec. at 49 (finding that 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). Here, based on the "Stock Power," the beneficiary was the owner of the petitioning entity at the time of filing. The record indicates that Latiff Mohammed did not acquire stock ownership in the petitioning entity until approximately nine months after the immigrant petition was filed. Accordingly, the petitioner and the beneficiary's foreign employer did not possess the requisite qualifying relationship on the filing date. For this additional reason, the petition will be denied.

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.