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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: LIN-00-123-50180 Office: Nebraska Service Center Date: OCT 31 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion to reopen and reconsider. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is an upscale, full-service restaurant with 40 employees and an approximate gross annual income of \$980,000. It seeks to extend its authorization to employ the beneficiary as a food and beverage service manager for a period of three years.

The director denied the petition based on a determination that the petitioner had failed to establish that the restaurant industry normally requires a baccalaureate degree for positions similar to the proffered one. The director also denied the petition because the petitioner had failed to submit evidence to show that the beneficiary's foreign education and work experience are equivalent to a U.S. bachelor's degree in a specific field of study.

On appeal, counsel asserted that the expert opinions provided by the petitioner in support of the petition were evaluated improperly and dismissed unfairly. Counsel asserted that the university professor who evaluated the beneficiary's educational and employment background is authorized to grant college-level transfer credits.

The Associate Commissioner dismissed the appeal reasoning that the petitioner had not shown that the proffered position is a specialty occupation or that the beneficiary qualifies to perform services in a specialty occupation.

On motion, counsel asserts that the Service improperly ignored its own prior determination that the proffered position is a specialty occupation and the beneficiary qualifies to perform services in a specialty occupation. Counsel asserts that no conditions in the conditions and terms of the beneficiary's employment have changed since the original petition was approved and argues that the Service has cited no cases or authority granting discretion to reverse the prior approval of the petition. Counsel further argues that the proffered position is a specialty occupation and the beneficiary qualifies to perform services in a specialty occupation. Counsel submits four affidavits along with copies of documentation previously submitted in support of the petition.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1),

defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The term "specialty occupation" is defined at 8 C.F.R. 214.2(h)(4)(ii) as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. The petitioner describes the duties of the offered position as follows:

. . . train, hire and assign workers; administer inventory and budget expenditures by utilizing sophisticated computerized systems; develop menus and adapt French and Italian recipes to local ingredients; present and purchase wines and beverages to compliment the Mediterranean presentation of all food items; and investigate and resolve food quality and service complaints in a highly professional and skilled manner.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2002-2003 edition, at pages 55-56 describes the duties of a food service manager as follows:

One of the most important tasks of food service managers is selecting successful menu items. . . . Managers or executive chefs select menu items, taking into account the likely number of customers and the past popularity of dishes. Other issues taken into consideration when planning a menu include unserved food left over from prior meals that should not be wasted, the need for variety, and the seasonal availability of foods. Managers or executive chefs analyze the recipes of the dishes to determine food, labor, and overhead costs, and to assign prices to various dishes. . . .

The quality of food dishes and services in restaurants depends largely on a manager's ability to interview, hire, and, when necessary, fire employees. . . . Once a new employee is hired, managers explain the establishment's policies and practices and oversee any necessary training. Managers also schedule the work hours of employees, making sure there are enough workers present to cover peak dining periods.

Another fundamental responsibility of food service managers is supervising the kitchen and dining room. For example, managers often oversee all food preparation and

cooking, examining the quality and portion sizes to ensure that dishes are prepared and garnished correctly and in a timely manner. They also investigate and resolve customers' complaints about food service or quality. . . .

To minimize food costs and spoilage, many managers use inventory-tracking software to compare the record of daily sales with a record of present inventory.

A review of the Handbook at pages 56-67 finds no requirement of a baccalaureate degree in a specialized area for employment as a restaurant or food service manager. Some restaurant and food service managers are promoted from the ranks of restaurant workers. Others hold baccalaureate and associate (two-year) degrees in restaurant management and other fields of study. While the DOL states at page 57 of the Handbook that a bachelor's degree in restaurant and food service management provides a particularly strong preparation for a career in this occupation, this statement does not demonstrate that a bachelor's degree in that field is the normal minimum requirement for entry into the occupation.

Additionally, the petitioner has not shown that the degree requirement is common to the industry in parallel positions among similar organizations. On motion, counsel presents additional information regarding the unique nature of the petitioner's business in the context of Montana's liquor license scheme. Specifically, counsel explains that Montana law allows limited casino-type gambling, but only establishments holding a full liquor license may offer gambling. As a result, liquor licenses are very expensive in Montana. Counsel states that Montana's restaurant business is dominated by casinos that offer food at reduced prices to attract gamblers. Counsel further states that the petitioner opted to obtain a beer and wine license, a license which does not permit gambling machines. Counsel asserts that Enzo is one of the few restaurants in Montana that must rely entirely on quality food and exceptional service in order to compete with restaurants which offer full liquor service and gambling machines. Counsel states that ten or fewer non-gambling, full-service restaurants exist in the state of Montana. For these reasons, counsel asserts, the petitioner requires the services of a food and beverage service manager with a bachelor's degree or its equivalent in a field such as hospitality management for the proffered position.

In support of these assertions, counsel submits four affidavits attesting to the unique nature of the restaurant industry in Montana and the need of a food service manager with a bachelor's degree or the equivalent for an upscale restaurant such as Enzo. Counsel has previously submitted various other documents attesting to these same claims. The Service has not disputed the unusual nature of the restaurant industry in Montana or the need for a

skilled and experienced restaurant manager to ensure the success of a restaurant like Enzo. However, the Service is not persuaded that these facts demonstrate that this particular position requires a bachelor's degree in hospitality management or a related field. As stated in the previous decision dismissing the appeal, these advisory opinion letters are insufficient to show an industry standard. None of the writers has provided evidence in support of their assertions.

Although the petitioner states that it normally requires a baccalaureate degree in hospitality management or a related field for the proffered position, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388. Furthermore, neither counsel nor the petitioner has submitted any evidence to show that the degree requirement is part of the hiring process. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel asserts that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is normally associated with the attainment of a bachelor's degree in a specific field of study. In support of his assertion,

¹ The court in Defensor v. Meissner observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." Supra at 387.

counsel cites the advisory opinion letters discussed above. However, the specific duties of this position are no more complex than those normally expected of a food service manager in a restaurant, as that job is described in the Handbook. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specialized area is the minimum requirement for employment as a food service manager.

The second issue to be determined in this proceeding is whether the beneficiary qualifies to perform services in a specialty occupation.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D), equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP) or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:
 - (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record shows that the beneficiary was awarded the [REDACTED] in the specialty of Hotel and Catering Management by the French Republic Ministry of National Education on June 25, 1984. The credentials evaluator, [REDACTED] found the beneficiary's foreign education equivalent to completion of two years or 60 semester credits in hospitality management at a regionally accredited U.S. college or university. This portion of the evaluation appears reasonable and will be accepted.

There is no indication in the record that the beneficiary has completed recognized college-level equivalency examinations or special credit programs, such as CLEP or PONSI. Additionally, the petitioner has not submitted evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

Since the beneficiary lacks two years of baccalaureate level studies, the petitioner must demonstrate that the beneficiary has six years of work experience in areas related to the specialty and that the alien has achieved recognition for expertise in the specialty occupation as a result of such work experience. (Emphasis added.)

According to the beneficiary's resume, he has the following work experience:

1. From August 1989 to October 1989, the beneficiary worked as a pastry chef at [REDACTED] in France.
2. From November 1989 to January 1990 the beneficiary worked as a chef for the [REDACTED] in [REDACTED]

3. From February 1990 to June 1993 the beneficiary worked as a banquet manager for the [REDACTED] in [REDACTED]
4. From July 1993 to October 1993 the beneficiary worked for the [REDACTED] as a catering manager for all Palais des Festivals bars in [REDACTED]
5. From November 1993 to January 1997 the beneficiary was employed by the [REDACTED] as a catering manager at the [REDACTED] in [REDACTED]
6. From January 1997 to July 1998 the beneficiary worked as general assistant hotel manager and then co-manager at the [REDACTED] in [REDACTED] a hotel owned by the [REDACTED]
7. From June 18, 1998 to the date of filing of the petition, the beneficiary worked for the petitioner as Manager of [REDACTED] in [REDACTED] in nonimmigrant H-1B status.

No evidence has been provided to document the duties performed by the beneficiary during his employment as a pastry chef from August 1989 to October 1989 or as a chef from November 1989 to January 1990. Therefore, that employment will not be considered in determining whether the beneficiary's foreign education and work experience are equivalent to a bachelor's degree in hospitality management, food and beverage management, or a related field.

The petitioner has submitted the following evidence to corroborate the beneficiary's work experience from February 1990 to July 1998:

1. work certificate from the Casino Croisette in Cannes, France, stating that the beneficiary worked as Banquet Director from January 20, 1990 to June 20, 1993; as a Restaurant Manager from June 21, 1993 to October 31, 1993; and as a Catering Manager from November 1, 1993 to December 31, 1996;
2. job description for the position of Catering Manager at the Casino Croisette;
3. work certificate from the [REDACTED] in [REDACTED] stating that the beneficiary was employed as a Catering Manager at that casino from February 1, 1994 to March 31, 1997;
4. A letter dated February 24, 1998, from [REDACTED] General Manager at the [REDACTED] states that he has worked with the beneficiary

since January 1, 1997. [REDACTED] further states that he became aware of the beneficiary's work at the [REDACTED] [REDACTED] and recruited the beneficiary to work for him as Deputy General Manager at the [REDACTED] in [REDACTED]

5. job description for the position of Deputy General Manager at the [REDACTED] in [REDACTED]

The credentials evaluator [REDACTED] considered the beneficiary's work experience from January 1990 to the filing date of the instant petition as demonstrated by the evidence listed above and found the beneficiary's foreign education and work experience equivalent to a Bachelor's Degree in Business Administration with an emphasis in Hospitality Management at a regionally accredited college or university in the United States.

The petitioner has also submitted an advisory opinion letter from [REDACTED] Associate Professor and Chairman of the [REDACTED] at [REDACTED] in [REDACTED]. [REDACTED] found the beneficiary's foreign education and work experience equivalent to a Bachelor's Degree in Management with an emphasis in Hospitality Management from an accredited U.S. college or university.

The Service uses an independent evaluation of a person's foreign credentials in terms of education in the United States as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be rejected or given less weight. Matter of Sea, Inc., 19 I&N Dec. 817 (Comm. 1988).

Counsel argues on motion that the Service summarily dismissed the evaluation by [REDACTED] because there is no evidence in the record to show that he is an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. However, as stated above, the Service accepts the portion of [REDACTED] evaluation relating to the U.S. equivalence of the beneficiary's two-year course in hospitality management.

Counsel further argues that the relevant regulations do not limit the performance of equivalency evaluations to college or university officials who have authority to grant college-level credit. Counsel erroneously asserts that 8 C.F.R. 214.2(h)(4)(iii)(D)(1) specifically allows equivalency evaluations to be performed by a college or university official who has "experience in the specialty at an accredited college or university which has a program for granting such credit." The language cited by counsel does not state that equivalency evaluations may be performed by officials

who have "experience" at colleges or universities which have a program for granting such credit. Rather, it states that an evaluation of an alien's *training and/or experience in the specialty* may be performed by an official who has authority to grant college-credit for such training and/or experience at an accredited college or university which has a program for granting such credit. (Emphasis added.) Since there is no evidence to show that [REDACTED] is such an official, the portion of his evaluation equating the beneficiary's foreign education and work experience to a U.S. educational equivalence is accorded little weight.

Dr. Miller has not stated, nor has he provided any evidence to show, that he is an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. Counsel asserts that [REDACTED] is an accredited university which has a program for granting credit for equivalent experience. In support of his assertion counsel submits a letter which establishes that [REDACTED] is an accredited university. Counsel also submits a memorandum from [REDACTED] at [REDACTED] quotes the university's 1999-2001 catalog as follows:

Credit may be awarded for work completed at institutions outside of the United States. Students are responsible for submitting international transcripts to an evaluating agency recognized by the National Association of Foreign Student Affairs (NAFSA). After the Office of Admissions has received the agency's evaluation, it will assess the agency's recommendations to determine accreditation and transferability of credit. A minimum grade of "C" must be earned for a course to transfer.

While [REDACTED] awards transfer credits for academic courses completed at institutions of higher education outside the United States, this document does not state that the University has a program for granting academic credit for training and/or work experience attained outside the United States. As stated above, the petitioner has not shown that [REDACTED] is an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. Therefore, the evaluation by [REDACTED] is accorded little weight.

The petitioner has submitted four letters from various individuals attesting to the professional skill with which the beneficiary has managed [REDACTED] and the contribution he has made to the success of the restaurant. One of the writers is a real estate broker and

developer; one is the branch manager and vice president of a bank; one is a United States Senator; and one is the Executive Director of the [REDACTED] Association, [REDACTED]. While the first three writers have experience in dining in the petitioner's restaurant and/or have business connections with the restaurant, none of these writers will be accepted as recognized authorities in the same specialty since none of them is a restaurant manager or food and beverage manager. [REDACTED] states in his letter that he has been a lobbyist for the Montana Restaurant Association for eight years. While [REDACTED] might be considered a recognized authority in the occupation of lobbying for a restaurant association, he has not provided any documentation to show that he has prior work experience or education that would qualify him to render an opinion as to the educational requirements for food and beverage managers in the [REDACTED] restaurant industry. For this reason, [REDACTED] will not be accepted as a recognized authority in the occupation of restaurant or food and beverage manager.

The beneficiary is not a member of any organizations whose usual prerequisite for entry is a baccalaureate degree in a specialized field of study. The record contains no evidence that the beneficiary holds a state license, registration, or certification which authorizes him to practice a specialty occupation. The petitioner has not submitted evidence from a recognized authority stating that the beneficiary has made significant contributions to the field of restaurant management. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the beneficiary qualifies to perform services in a specialty occupation.

On motion, counsel asserts that the Service has already determined that the proffered position is a specialty occupation and the beneficiary qualifies to perform services in a specialty occupation since the Service approved the previous petition filed by the petitioner on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the initial nonimmigrant petition, and this record of proceeding does not contain a copy of the previous petition. If the prior petition was approved based on the same evidence contained in this record of proceeding, however, the approval of the initial petition would have involved gross error. The Service is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See e.g. Matter of Church of Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). Neither the service nor any other agency must treat acknowledged errors as binding precedent. Sussex Engg. Ltd. v. Montgomery 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988).

As noted in the prior decision, the Associate Commissioner, through the AAO, is not bound to follow the contradictory decision of a

service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La.). The AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the court of appeals, service center decisions do not control the AAO. Id. at 3.

Additionally, the Service does not agree with counsel's argument that the facts in Tapis v. INS, 94 F.Supp.2d 173 (D. Mass. 2000) are analogous to the facts of this case simply because the petitioner in that proceeding sought to extend its authorization to employ the beneficiary. The district court found in Tapis that the Service had abused its discretion by failing to provide an explanation for its refusal to adhere to its precedent in having approved the initial petition. In this case, however, the Service has provided an extensive explanation for its reasoning in finding that the proffered position is not a specialty occupation, and has cited the relevant authority upon which it relied to reach such conclusion. Therefore, counsel's argument is not persuasive.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The decision of the Associate Commissioner dated April 24, 2002, is affirmed.