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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
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Services

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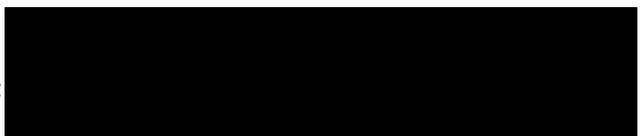
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File: EAC 02 080 54116 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



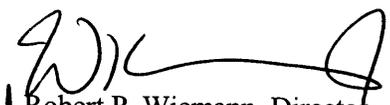
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center denied the petition for an extension of a nonimmigrant L-1B visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Satyam Computer Services, Ltd., provides information technology services worldwide. The petitioner serves as the company's U.S. branch office. Citizenship and Immigration Services (CIS) approved an L-1B visa for the beneficiary under a blanket petition. The petitioner seeks to extend the beneficiary's classification as an L-1B intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L).

The director concluded that the beneficiary did not qualify as a specialized knowledge worker as contemplated under the regulations. Specifically, the director determined, "[The beneficiary's] duties . . . do not appear to be significantly different from those of any software engineer in a technology consulting firm, and therefore do not serve to establish that they warrant the expertise of someone possessing truly specialized knowledge." The petitioner submitted a brief to the director captioned "Motion to Reopen." In accordance with 8 C.F.R. § 103.3(a)(2)(iv), the director declined to treat the appeal as a motion and forwarded the appeal to the Associate Commissioner for review.

On appeal, counsel states that the petitioner has achieved a rating of 5 under the Capability Maturity Model for Software (CMM), which the Software Engineering Institute (SEI) administers. According to counsel, "SEI-CMM assessment levels range from 1 to 5, where 1 represents an organization whose processes are random. Level 5 represents an organization where processes are optimized . . ." Citing a March 2001 SEI report, counsel asserts that the petitioner "was one of only 3 large organizations (establishments (national and international) with more than 2,000 employees primarily engaged in software development and maintenance activities) to have achieved SEI-CMM Level 5 Assessment." In turn, counsel argues that, because the petitioner trained the beneficiary to function at SEI-CMM Level 5, the beneficiary qualifies as a specialized knowledge worker.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Moreover, 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

In regard to specialized knowledge capacity, section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides:

For purposes of section 101(a)(15)(L) [of the Act, 8 U.S.C. § 1101(a)(15)(L)], an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(D) define “specialized knowledge”:

Specialized knowledge means special knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization’s processes and procedures.

In examining the specialized knowledge capacity of the beneficiary, CIS will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In an April 4, 2002 letter submitted in response to the director’s February 11, 2002 request for evidence, the petitioner listed the beneficiary’s current job duties as a software specialist:

- Use tools such as Satyam’s QualIFY (Quality Management, Knowledge Management, and Process Capability Systems) to size, estimate, and track testing projects
- Ensure that project resources understand the project’s quality goals
- Plan Software Quality Assurance (SQA) activities
- Quantify and manage progress towards achieving goals for software work products
- Establish and monitor the project’s defined software process
- As may be required, inform senior management of non-compliance issues and deviations from the established SQA plan that cannot be resolved at project level
- Establish and coordinate Software Configuration Management (SCM) activities as per Satyam’s SCM Plan
- Implement Software Project Tracking and Oversight plan
- Establish, monitor and ensure that changes to all configurable items as per Satyam’s Change Control Procedure
- Verify and ensure that that design document’s approach taken is in line with the Westfield Group’s 5.3 System Architecture

- Develop and maintain systems documentation, such as design specifications, user manuals, technical manuals, and description of application operations, methodology documentation
- Analyze business and system requirements, which includes impact analysis on existing systems, and ensure that the project changes do not overlook or adversely impact any of the existing system components
- Analyze and research daily production problems and suggest solutions to Satyam's QA team
- Set up test environmental and test data for timely and exhaustive projective testing
- Ensure that software work products meet project operational process requirement and Software Project Plan
- Conduct Final Inspections before software work items are released to client
- Provide technical/functional guidance to offshore resources as required
- Provide technical assistance, training, and mentoring as required
- Coordinate change and revision management to ensure inter-operability of Westfield Group's systems
- Coordinate Satyam's onsite and offshore resources to ensure that deliverables are handed over to client within established critical quality, time, and cost parameters
- Oversee Defects Prevention Activities: Peer Reviews, Causal Analyses Sessions, Inspections, etc., as per DP Checklist, guidelines for software product quality, project plan template, etc., of work product produced onsite and offshore
- Track Defects Prevention activities
- Escalate issues as may be necessary
- Schedule fortnightly Defects Prevention meetings, as well as on a need basis as required
- As may be required, lead efforts to pilot and implement process and an/or technology change measures as per guidelines established by the Software Process Engineering Group

Additionally, the April 4, 2002 letter noted that the petitioner provided the beneficiary with an unspecified period of training in the company's SEI-CMM Level 5 software development and maintenance process.

The petitioner appended the beneficiary's resume to Form I-129. The resume reported the beneficiary's technical skills as:

Operating Systems	MVS, MS-Windows NT/98, UNIX
Programming Languages	MVS COBOL, SQL, JCL, C, JAVA, PASCAL IBM Assembly
Database/File Systems	MVS VSAM, DB2, MS-ACCESS
Hardware	IBM 3090, IBM PC
On-line Systems	CICS
Tools & Utilities	XPEDITER, FILE-AID, LIBRARIAN, INTER TEST, FILE MASTER, MR REVOLVE, COBOL ANALYST 2000, Control-M, R and T

The beneficiary's duties and technical skills as a software specialist, while impressive, demonstrate knowledge which is common among software specialists and others in the field of information technology. In fact, on appeal, counsel admits, "The petitioner readily acknowledges that the beneficiary's level of knowledge of the kinds of computer hardware and software systems used on the assignments on which he was employed is comparatively common in the industry." Thus, the only question is whether the beneficiary's knowledge of SEI-CMM Level 5 assessment tools qualifies him as a specialized knowledge worker.

In the petitioner's view, the beneficiary's knowledge of SEI-CMM Level 5 assessment tools qualifies the beneficiary as a specialized knowledge worker. Specifically, counsel states, first, that the petitioner is one of a handful of companies which has achieved an SEI-CMM Level 5 assessment. Second, counsel reports that the petitioner trains its employees, including the beneficiary, to use the SEI-CMM Level 5 assessment process. Counsel argues that, given these facts, the beneficiary must be a specialized knowledge worker.

There is, however, no evidence in the record, such as a course certification or company training records, to establish that the beneficiary actually received SEI-CMM level 5 training or attended any in-house training courses. Counsel merely asserts that the beneficiary is one of a group of information technology professionals to have received the SEI-CMM Level 5 training. Without documentary evidence to support the claim, the assertion of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Once again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has failed to document that the beneficiary has actually received the petitioner's SEI-CMM Level 5 training, the basis for the beneficiary's claim to specialized knowledge. For this reason alone, the petition may not be approved.

On appeal, counsel also refers to a 1994 Immigration and Naturalization (INS) memorandum as a guide for interpreting the statutory definition of specialized knowledge. Memorandum from James A. Puleo, Acting Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). In the memorandum, the Commissioner noted that specialized knowledge is not limited to knowledge that is proprietary, exclusive or unique, but also includes knowledge that is “different from that generally found in [a] particular industry.” Counsel argues that the beneficiary’s training in the petitioner’s SEI-CMM Level 5 assessed software development and maintenance process establishes that the beneficiary’s knowledge is “different from that generally found in the software sector not only in the United States but internationally.”

The beneficiary’s ability to execute Level 5 assessed software development and maintenance processes does not by itself establish that the beneficiary’s knowledge is different from that generally found in the industry. The Software Engineering Institute is a research and development center that offers, among other things, education and training classes organized to aid companies in determining their ability to develop and maintain their software products. See SEI Education and Training, Introduction to the Software CMM, <http://www.sei.cmu.edu/products/courses/info/intro.cmm.html>, (last updated Nov. 4, 2003). Because SEI is a voluntary training facility, any software company can purchase a report on how to perform software process assessments and train its employees in order to receive a Level 5 rating. Although requested by the director, counsel failed to provide evidence that the beneficiary possesses knowledge that can normally be gained only through prior experience with the petitioning organization. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Although it may be difficult for an organization to achieve Level 5 status, the knowledge to gain that status is widely available and can be “generally found in the industry.”

Finally, with regard to counsel’s reliance on the 1994 Associate Commissioner’s memorandum, it is noted that the memorandum was intended solely as a guide for employees and will not supersede the plain language of the statute or the regulations. Although the memorandum may be useful as a statement of policy and as an aid in interpreting the law, it was intended to serve as guidance and merely reflects the writer’s analysis of the issue. Counsel also acknowledges such in his brief on appeal in which he states that the 1994 memorandum was “intended to provide Service Centers, field offices, and the AAO *with guidance in interpreting the statutory definition of specialized knowledge . . .*” (emphasis added). Therefore, by itself, counsel’s assertion that the beneficiary’s qualifications are analogous to the examples outlined in the memorandum is insufficient to establish the beneficiary’s qualification for classification as a specialized knowledge professional. Specifics are clearly an important indication of whether a beneficiary’s duties encompass specialized knowledge; otherwise, meeting the definition would simply be a matter of reiterating the regulations. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). As discussed, the petitioner has not submitted probative evidence to establish that the beneficiary’s knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known in the alien’s field of endeavor.

Counsel also contends on appeal that the legislative history dictates that the specialized knowledge classification should not be limited to those “relatively rare employees” of an organization who possess unique knowledge of the company’s exclusive processes and techniques. Counsel claims that the L-1B classification was, instead, intended to assist companies locating in the United States in transferring their

present personnel who already had knowledge of its operations. Therefore, counsel asserts that the director's decision contradicts the legislative history interpreting the term specialized knowledge.

While the AAO acknowledges that the specialized knowledge classification is not solely for those "relatively rare employees with unusual knowledge," the legislative history for the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In *1756, Inc. v. Attorney General*, 745 F. Supp. 9 (D.D.C. 1990), the court upheld the denial of an L-1 petition for a chef, where the petitioner claimed that the chef possessed specialized knowledge. The court noted that the legislative history demonstrated a concern that the L-1 category would become too large: "The class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated and monitored by the Immigration and Naturalization Service." *Id.* at 16 (citing H.R. REP. No. 91-851, 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815). The court stated, "[I]n light of Congress' intent that the L-1 category should be limited, it was reasonable for the INS to conclude that specialized knowledge capacity should not extend to all employees with specialized knowledge. On this score, the legislative history provides some guidance: Congress referred to 'key personnel' and executives." *1756, Inc.*, 745 F. Supp. at 16.

Similarly, in *Matter of Penner*, the Commissioner emphasized that the specialized knowledge worker classification was not intended for "all employees with any level of specialized knowledge." 18 I&N Dec. 49 (Comm. 1982). According to *Matter of Penner*, "[s]uch a conclusion would permit extremely large numbers of persons to qualify for the 'L-1' visa" rather than the "key personnel" that Congress specifically intended. *Id.* at 53. In accordance with the statute and the legislative history, it would be inappropriate to expand the visa category to allow the entry of any personnel who already had knowledge of a petitioner's operations.¹

If the AAO were to follow counsel's reasoning, then any employee would qualify for a specialized knowledge visa if that employee had experience working for a company with special accreditation, such as SEI-CMM Level 5. The evidence presented indicates that 37 software engineering firms have attained SEI-CMM Level 5 certification. To assert that any employee of these firms should qualify for an L-1B visa would fundamentally alter the nature of the visa classification. Such an expansion of the term "specialized knowledge" would transform the visa classification from one for aliens with specialized knowledge to one for any employee working for an enterprise with special accreditation. In short, counsel's interpretation of the regulations improperly emphasizes a firm's accreditation rather than an employee's specialized knowledge.

¹ The precedent decision *Matter of Penner* pre-dates the 1990 amendment to the definition of "specialized knowledge." Other than deleting the former requirement that specialized knowledge had to be "proprietary," however, the 1990 amendment did not greatly alter the definition of the term. In particular, the 1990 Committee Report does not even support the claim that Congress "rejected" the INS interpretation of "specialized knowledge." The 1990 Committee Report does not criticize, and does not even refer to, any specific INS regulation or precedent decision interpreting the term. The Committee Report simply states that the Committee was recommending a statutory definition because of "[v]arying," [*i.e.*, not specifically incorrect], "interpretations by INS," H. Rep. No. 101-723(I), *supra*, at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that, the Committee Report simply restates the tautology that became § 214(c)(2)(B) of the Act. *Id.* The AAO concludes, therefore, that *Matter of Penner* remains useful guidance concerning the intended scope of the "specialized knowledge" L-1B classification.

Furthermore, it should be noted that Congress' 1990 amendments to the Act did not specifically overrule *1756, Inc.* nor any other administrative precedent decision, nor did the 1990 amendments otherwise mandate a less restrictive interpretation of the term "specialized knowledge." The House Report, which accompanied the 1990 amendments, stated:

One area within the L visa that requires more specificity relates to the term "specialized knowledge." Varying interpretations by INS have exacerbated the problem. The bill therefore defines specialized knowledge as special knowledge of the company product and its application in international markets, or an advanced level of knowledge of processes and procedures of the company.

H.R. REP. No. 101-723(I), 1990 U.S.C.C.A.N. 6710, 6749, 1990 WL 200418. As previously noted, the statutory definition states, "an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company." 8 U.S.C. § 1184(c)(2)(B).

Prior to the Immigration Act of 1990, the statute did not provide a definition for the term "specialized knowledge." Instead, the regulations defined the term as follows:

"Specialized knowledge" means knowledge possessed by an individual whose advanced level of expertise and proprietary knowledge of the organization's product, service, research, equipment, techniques, management, or other interests of the employer are not readily available in the United States labor market. This definition does not apply to persons who have general knowledge or expertise which enables them merely to produce a product or provide a service.

8 C.F.R. § 214.2(1)(1)(ii)(D)(1990).

Although the Immigration Act of 1990 provided a statutory definition of the term "specialized knowledge," Congress did not give any indication that it intended to expand the field of aliens that qualify as possessing specialized knowledge. Although the statute omitted the term "proprietary knowledge" that was contained in the regulations, the statutory definition still calls for "special knowledge" or an "advanced level of knowledge," similar to the original regulation. Neither the 1990 House Report nor the amendments to the statute indicate that Congress intended to expand the visa category beyond the "key personnel" that were originally mentioned in the 1970 House Report. Considered in light of the original 1970 statute and the 1990 amendments, it is clear that Congress intended for the class of nonimmigrant L-1 aliens to be narrowly drawn and carefully regulated, and to this end provided a specific statutory definition of the term "specialized knowledge" through the Immigration Act of 1990.²

² In addition, a review of the 1970 House Report indicates that Congress assumed that the nonimmigrant intracompany transferees would not compete with United States citizens for employment. When discussing airline personnel, for example, the Chairman noted that flight attendants on international flights would not enter the United States under an L-1 nonimmigrant classification but could enter on an international flight under a different nonimmigrant classification. The Chairman observed that the entry of flight attendants was regulated to prevent them from competing with United States citizen flight attendants.

Finally, it is noted that the statutory definition still requires the AAO to make comparisons in order to determine what constitutes specialized knowledge. The term “specialized knowledge” is a comparative concept and cannot be plainly defined. As observed in *1756, Inc.*, “[s]imply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning.” 745 F. Supp. at 15. Contrary to counsel’s belief that the comparison should be between the beneficiary and the industry in general, the comparison cannot be limited solely to the general labor market. The Congressional record specifically states that the L-1 category was intended for “key personnel.” See generally, H.R. REP. No. 91-851, 1970 U.S.C.C.A.N. 2750. The term “key personnel” denotes a position within the petitioning company that is “of crucial importance.” See *Webster’s II New College Dictionary* 605 (Houghton Mifflin Co. 2001).

In general, all employees can reasonably be considered “important” to a petitioner’s enterprise. If an employee did not contribute to the overall economic success of an enterprise, there would be no rational reason to employ that person. Accordingly, an employee of “crucial importance” or “key personnel” must rise above the level of the petitioner’s average employee. Based on the definition of “specialized knowledge” and the congressional record related to that term, the AAO must make comparisons not only between the claimed specialized knowledge employee and the general labor market, but also between that employee and the remainder of the petitioner’s workforce.

Counsel’s expansive interpretation of the specialized knowledge provision is also objectionable, as it would allow virtually any skilled or experienced employee to enter the United States as a specialized knowledge worker. In *Matter of Penner, supra*, the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. Although the definition of “specialized knowledge” in effect at the time of *Matter of Penner* was superseded by the 1990 Act to the extent that the former definition required a showing of “proprietary” knowledge, the reasoning behind *Matter of Penner* remains applicable to the current matter. The decision noted that the 1970 House Report, H.R. No. 91-851, was silent on the subject of specialized knowledge, but that during the course of the sub-committee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed “L” category. In response to the Chairman’s questions, various witnesses responded that they understood the legislation would allow “high-level people,” “experts,” individuals with “unique” skills, and that it would not include “lower categories” of workers or “skilled craft workers.” *Matter of Penner, supra* at 50 (citing H.R.

Regarding the L-1 classification, the Chairman stated that “the international personnel would not be competing, in my opinion at least, with an American worker which I think is a significant differentiation.” H.R. Subcomm. No. 1 of the Jud. Comm., *Immigration Act of 1970: Hearings on H.R. 445*, 91st Cong. 222 (November 12, 1969).

Just as flight attendants do not normally enter under the L-1 classification, *Delta Airlines, Inc. v. USDOJ*, Civ. No. 00-2977 LFO (D.D.C. April 6, 2001), summarily affirmed, *Delta Airlines, Inc., v. USDOJ*, No. 01-5186, 2001 WL 1488616 (D.C.Cir. 2001), computer programmers typically enter the United States as nonimmigrant workers under the H-1B classification, which is also regulated to prevent them from unfairly competing with United States workers. See generally 8 C.F.R. § 214.2(h). Although not a determining factor in the present case, the beneficiary’s current salary appears to be lower than the prevailing wage earned by a computer programmer employed in California, the state in which the beneficiary is presently working. See U.S. Dept. of Labor, Employment & Training Administration, <http://www.flcdatacenter.com/owl.asp> (last updated Jan. 6, 2003).

Subcomm. No. 1 of the Jud. Comm., *Immigration Act of 1970: Hearings on H.R. 445*, 91st Cong. 210, 218, 223, 240, 248 (November 12, 1969)). Reviewing the congressional record, the Commissioner concluded that an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. For the same reasoning, the AAO cannot accept the proposition that any skilled worker is necessarily a specialized knowledge worker.

In the present case, an evaluation of the record reveals that other software companies have achieved an SEI-CMM Level 5 rating, that the claimed specialized knowledge is itself widely available, and that other organizations, although not assessed at a SEI-CMM Level 5, may employ workers with knowledge equivalent to that of the beneficiary. Furthermore, the petitioner has failed to document that the beneficiary has actually received the petitioner's SEI-CMM Level 5 training, the basis for the beneficiary's claim to specialized knowledge. Thus, as the petitioner has not established that the beneficiary possesses a special knowledge of the petitioner's product or an advanced level of knowledge of the company's processes or procedures, the director reasonably determined that the beneficiary does not qualify as a specialized knowledge worker.

It is noted that the current petition is for an extension of an L-1B petition that was previously approved by the director. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Even if a service center director has approved a nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.