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U.S. Citizenship and Immigration Services

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AUG 23 2005

IN RE: Petitioner:
Beneficiary:



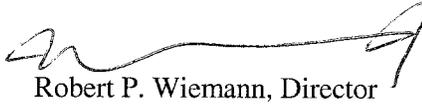
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1B nonimmigrant intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is engaged in the design, manufacture, sales and marketing of process automation systems for the pulp and paper mill industry. The petitioner claims that it is the affiliate of the beneficiary's foreign employer, located in Toronto, Canada. The beneficiary was previously granted L-1B classification for a three-year period and has entered the United States intermittently to serve as a project engineer. The petitioner now seeks authorization to employ the beneficiary in this position for an additional two-year period.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that he will be employed by the United States entity in a specialized knowledge capacity. The director noted that the petitioner had not established that the beneficiary's knowledge of the petitioner's products and systems is different or more advanced than that of any other project engineer employed within the United States entity or its Canadian affiliate.

On appeal, counsel for the petitioner asserts that the director applied an inappropriate standard in determining whether the beneficiary is qualified for the benefit. Counsel states that the evidence on record is sufficient to establish that the beneficiary possesses specialized knowledge due to his training and experience, and that he will be employed in a specialized knowledge capacity with the petitioner. Counsel requests that the evidence be reconsidered in light of a 1994 Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) memorandum. Counsel submits a brief, copies of previously submitted evidence, and copies of two CIS memoranda in support of the appeal.

To establish eligibility for the nonimmigrant L-1 visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 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.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in the present matter is whether the petitioner has established that the beneficiary will be employed by the United States entity in a specialized knowledge capacity as required by the regulation at 8 C.F.R. § 214.2(l)(3)(ii).

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the following:

For purposes of section 101(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 regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines "specialized knowledge" as:

[S]pecial 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.

The petitioner submitted the nonimmigrant petition on June 2, 2003. In a May 19, 2003 letter submitted with the petition, the petitioner described the proposed United States position:

[The petitioner] desires to employ [the beneficiary] on an as-needed basis as Project Engineer to perform specialized engineering and development services in connection with the design, development, configuration, installation, testing and debugging of the Paper Automation process control technology designed by [the petitioner's group]. [The beneficiary] will use his knowledge of the . . . proprietary process control technology as applied in the pulp and paper environment to determine the type and scope of process control achievable within a mill and will modify, implement and evaluate the control strategy. Specific job duties include configuration, commissioning, start-up, maintenance, servicing, and testing our patented proprietary systems. [The beneficiary] will play a pivotal role in system start-up and installation at the customer site, including configuration and testing of our sophisticated systems, and he will also provide high-level engineering assistance in connection with plant shut-down activities that may occur within our U.S. customer base.

With respect to the beneficiary's qualifications, the petitioner provided the following explanation:

[The beneficiary] is well-qualified to assume the specialized knowledge job position Project Engineer by virtue of his education and by virtue of his prior employment in a capacity involving specialized knowledge with our affiliate . . . in Canada.

[The beneficiary] has been employed by [the foreign entity] since June 1999. [The beneficiary] currently serves as Project Engineer for our Canadian affiliate where his duties include installation and start-up of the DAMATIC product line, including commissioning, servicing, and testing.

The petitioner's letter also included a description of its corporate group's technology and specific systems developed by its Paper Automation Group, including the DAMATIC System, Sentry System and Sensodec System. The petitioner explains that these systems comprise computer software, hardware and electronic instrumentation that interface manufacturing systems with process control systems to increase quality control and production efficiency.

The director issued a request for evidence dated September 25, 2003, noting that the record did not demonstrate that the beneficiary possesses specialized knowledge. The director referenced a 1994 INS (now CIS) memorandum as providing guidance in establishing that an alien possessed specialized knowledge, and noted that the beneficiary's knowledge must be shown to be different and advanced from the knowledge generally held within the industry. Memorandum from James A. Puleo, Acting Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). The director requested that the petitioner submit "evidence that the beneficiary's knowledge is uncommon, noteworthy or distinguished by some unusual quality and not generally known by practitioners in the field." The director also noted that the beneficiary's knowledge of the petitioner's processes and procedures must be more than the basic or elementary knowledge possessed by others in the field. The director also noted that the petitioner must show that employment of the beneficiary or someone with equivalent knowledge is critical to the petitioner's proprietary interests, noting that L-1B classification does not extend to persons whose general knowledge and expertise enable them to merely produce a product or provide a service.

In response the petitioner submitted an affidavit from the U.S. entity's engineering manager which addresses the director's concerns. The petitioner stated that the affidavit will describe how the beneficiary's duties with regard to start-up and installation of the company's proprietary systems "are qualitatively different from the duties that could be performed by any other engineer." The petitioner included short descriptions of its DAMATIC, Sentry and Sensodec systems which were provided in its previous letter, and emphasized the proprietary nature of the systems. With respect to the beneficiary's qualifications the petitioner provides, in part:

10. [The beneficiary] has trained on . . . specialized process control systems and possesses specialized knowledge of [the petitioner's group's] proprietary property, in particular its patented DAMATIC/DNA/PaperIQ product lines, which knowledge is not available to

[the petitioner] through conventional sources in the United States. [The beneficiary] is also an expert in quality control matters.

11. [The petitioner] and its affiliate in Canada currently employ a total of 19 full-time engineers, 8 of them at its U.S. facility in Atlanta, Georgia and 11 at the Canadian affiliate location in Toronto. Of these full-time hires, 6 of them (4 in Canada and 2 in the US) had [experience with the petitioner's group] prior to starting as a full-time employee with either [the petitioner] or [the foreign entity], either through co-op work terms or at another . . . office. The remaining 13 were hired from the local labor market.
12. Those engineers hired from the local labor market serve as 'regular engineers' with responsibility to specify, configure, test and install our . . . control systems.
13. [The beneficiary's] job duties differ in that he is highly specialized in process control and [the group's] quality controls, and he possesses significant paper mill experience and knowledge that is essential for him to lead [the petitioner's] more complex projects and perform highly specialized tasks that the general engineers would not be able to do (*e.g.* develop a customized control from scratch, or tune a highly complex control).
14. In order to obtain this specialized knowledge, in addition to [the beneficiary's] work experience with [the Canadian entity], it was necessary for him to also complete additional training courses on [the petitioner's group's] patented paper automation systems in order to be qualified for this particular position.
15. Customers who purchase [the petitioner's] proprietary products must complete training courses in order to learn how to run the equipment, including courses on engineering and operator training, but in general [the petitioner's] customers never attain the level of expertise that [the beneficiary] and our other project engineers have, and [the petitioner] often gets demand service calls for engineering support and for system expansion.
16. [The beneficiary] serves as both a trainer for [the petitioner's] client customers and also as an engineer who provides critical field service in emergency situations. [The beneficiary's] specialized services are critical to [the petitioner] and its customers as a problem involving [the petitioner's] proprietary products can result in a customer needing to shut down the plant for a period of time, resulting in losses from \$100,000 to \$500,000 per hour, depending on the client's production rate. [The petitioner] sells and services high speed paper machines where efficiency and uptime are crucial, and it is essential that Project Engineers have years of specialized process and system knowledge to be able to respond immediately to a customer problem.
17. Because of his more than four years of experience with the installation, technical support, diagnosis, and troubleshooting of the complex problems and issues that arise in connection with [the petitioner's] sophisticated proprietary automation systems, in

particular its patented DAMATIC and Sensodec systems, [the beneficiary] does in fact possess the required specialized knowledge and performs specialized engineering and development services in connection with [the petitioner's] paper automation process control technology that are crucial to [the petitioner] and its [sic] clients.

The petitioner also submitted evidence to establish that the petitioner and its parent and affiliated companies hold over 1,000 patents for products and systems used in the pulp and paper industries, including four patents specific to its DAMATIC product line. In addition, the petitioner submitted sample training manuals and course descriptions, explaining that the petitioner's project engineers are required to successfully complete numerous specialized courses to work on the company's DAMATIC, Sensodec and metsoDNA products and systems.

Counsel claimed that the evidence submitted established that: (1) the petitioner and its affiliated companies hold patents for their proprietary systems; (2) the petitioner and its affiliates have developed practices to ensure that they can expertly install, test and maintain their system at client sites and provide expert repair services; (3) that the petitioner's and affiliates' employees must complete additional training courses specific to each of their proprietary systems; and, (4) the beneficiary has completed these courses and thus "has acquired knowledge that is uncommon, noteworthy and distinguished from other members of the engineering field as well as from other engineering employees of Petitioner who are not trained on these particular systems and equipment for which the Petitioner and its affiliates hold patents."

In a decision dated March 29, 2004, the director determined that the petitioner did not establish that the proposed "duties warrant the expertise of someone possessing truly specialized knowledge" or that knowledge of the company's methods "is indicative of advanced knowledge." The director specifically observed that most of the petitioner's engineers were hired without prior experience with the company. The director noted that the duties performed by the beneficiary are not different from any other project engineer within the company's paper automation group and the evidence submitted does not establish that he has a level of knowledge that constitutes "specialized knowledge." Consequently, the director denied the petition.

Counsel filed an appeal on May 3, 2004 stating that the director applied an incorrect standard that is contrary to the regulations and guidance subsequently provided by CIS policy memoranda regarding the interpretation of specialized knowledge. Counsel specifically noted that no test of the United States labor market is required in the analysis of a beneficiary's specialized knowledge qualifications, and that the director erred in denying the petition based, in part, on the fact that the petitioner and the foreign entity had hired project engineers from the local labor market. Counsel asserts that the director failed to consider evidence submitted which differentiates the beneficiary's duties from those of the company's "regular engineers." Counsel reviews the evidence previously submitted and states that the petitioner has established all specialized knowledge qualifications as outlined in a 2002 CIS memorandum. *See Memorandum of Fujie S. Ohata, Associate Commissioner, Interpretation of Specialized Knowledge, HQSCOPS 70/6.1 (December 22, 2002).* Specifically, counsel concludes (i) the beneficiary's knowledge is uncommon, noteworthy or distinguished by some unusual quality and generally unknown; (ii) the beneficiary's knowledge of the petitioner's products is apart from the elementary or basic knowledge possessed by others; and, (iii) the beneficiary's job duties involve knowledge or expertise beyond what is commonly held or is beyond the ordinary in the field.

Upon review, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a specialized knowledge capacity.

In examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed description of the services to be performed sufficient to establish specialized knowledge. *Id.*

Here, although the petitioner has provided a list of job duties to be performed by the beneficiary in the position of project engineer, the petitioner has not documented the beneficiary's claimed specialized knowledge. The petitioner repeatedly refers to specialized training completed by the beneficiary, particularly in DAMADIC and Sensodec systems, and suggests that such training is narrowly available within the company. The petitioner states that, by completing such training, the beneficiary is an "expert" in such systems, and asserts that such knowledge is required to perform the duties of the position offered in the United States. In support of this statement, the petitioner submits course descriptions and training manuals for courses encompassing various products and systems developed and deployed by the petitioner and its Canadian affiliate. However, the petitioner has neither provided documentary evidence, such as course completion certificates, to establish that the beneficiary actually completed any training courses within the petitioner's organization, nor has it identified the specific courses required to perform the proposed duties in the United States. Nor has the petitioner provided a list of specific projects to which the beneficiary has been assigned or any other documentation to evidence his hands-on experience with these systems. The only documentation of the beneficiary's qualifications contained in the record is a photocopy of the beneficiary's university diploma. 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)).

When analyzing whether a beneficiary's knowledge rises to the level of specialized, it is also appropriate for the AAO to look beyond the stated job duties and consider the importance of the beneficiary's knowledge of the business's product or service, management operations, or decision-making process. *Matter of Colley*, 18 I&N Dec. 117, 120 (Comm. 1981) (citing *Matter of Raulin*, 13 I&N Dec. 618 (R.C. 1970) and *Matter of LeBlanc*, 13 I&N Dec. 816 (R.C. 1971)).¹ As stated by the Commissioner in *Matter of Penner*, when considering whether the beneficiaries possessed specialized knowledge, "the *LeBlanc* and *Raulin* decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought." 18 I&N

¹ Although the cited precedents pre-date the current statutory definition of "specialized knowledge," the AAO finds them instructive. As will be discussed, other than deleting the former requirement that specialized knowledge had to be "proprietary," IMMACT 1990 did not significantly alter the definition of "specialized knowledge" from the prior INS interpretation of 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.R. Rep. No. 101-723(I) at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that, the Committee Report simply restates the tautology that became section 214(c)(2)(B) of the Act. *Id.* The AAO concludes, therefore, that the cited cases, as well as *Matter of Penner*, remain useful guidance concerning the intended scope of the "specialized knowledge" L-1B classification.

Dec. at 52. Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.* The Commissioner also provided the following clarification:

A distinction can be made between a person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is employed primarily for his ability to carry out a key process or function which is important or essential to the business' operation.

Id. at 53. In the present matter, the evidence of record demonstrates that the beneficiary is more akin to an employee whose skills and experience enable him to provide a specialized service, rather than an employee who has unusual duties, skills or knowledge beyond that of a skilled worker.

It should also be noted that the statutory definition of specialized knowledge requires the AAO to make comparisons in order to determine what constitutes specialized knowledge. The term "specialized knowledge" is not an absolute concept and cannot be clearly defined. As observed in *1756, Inc. v. Attorney General*, "[s]imply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning." 745 F. Supp. 9, 15 (D.D.C. 1990). 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." *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 economic reason to employ that person. An employee of "crucial importance" or "key personnel" must rise above the level of the petitioner's average employee. Accordingly, 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.

The 1994 Immigration and Naturalization Service memorandum referenced previously also allows CIS to compare the beneficiary's knowledge to the general United States labor market and the petitioner's workforce in order to distinguish between specialized and general knowledge. The Associate Commissioner notes in the memorandum that "officers adjudicating petitions involving specialized knowledge must ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized." Memorandum from James A. Puleo, Acting Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). A comparison of the beneficiary's knowledge to the knowledge possessed by others in the field is therefore necessary in order to determine the level of the beneficiary's skills and knowledge and to ascertain whether the beneficiary's knowledge is advanced. In other words, absent an outside group to which to compare the beneficiary's knowledge, CIS would not be able to "ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized." *Id.* The analysis for specialized knowledge therefore requires an examination of the knowledge in context of the foreign and United States labor market, but does not consider whether workers are available in the United States to perform the beneficiary's job duties.

In this case, the petitioner has established that its products are proprietary and thus distinguishes the beneficiary's knowledge from that generally known in the industry. The petitioner also attempts to distinguish the beneficiary's knowledge of the company's products as specialized, i.e., noteworthy or uncommon, or advanced within the petitioner's organization. The petitioner has failed to do so. Based on the record of proceeding, it appears that the petitioner and its Canadian affiliate are both engaged in the design, development, implementation and support of the same proprietary paper automation control systems. The petitioner has not successfully differentiated the beneficiary's knowledge from that of other engineers employed within the petitioner's or its affiliate's paper automation group. The petitioner asserted that it employs nineteen engineers in the paper automation groups in the United States and Canada, including 13 who were hired from the local labor market. The petitioner states that the other six engineers had experience with the petitioner's group prior to starting as full-time employees, through "co-ops" or through another office within the group. The petitioner further explained that the engineers hired from local labor markets are "regular engineers" who are responsible for specifying, configuring, testing and installing the petitioner's systems. The petitioner has provided no additional evidence, such as company job descriptions outlining the duties and requirements for these purportedly differently classes of engineering positions, or described the qualifications of other engineers within its paper automation groups in the United States and Canada. 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. at 165.

The petitioner presumably does not include the beneficiary among its "regular engineers" and claims that he "is highly specialized in process control and [the petitioner's] quality controls," which enables him to "lead more complex projects" and perform "highly specialized tasks that the general engineers would not be able to do." However, the petitioner has submitted no evidence to establish that the beneficiary was not one of its "local labor market" hires. The petitioner indicated that he joined the Canadian company as a project engineer in June 1999, but has provided no information regarding his professional background prior to that date. The beneficiary's diploma indicates that he graduated from the University of Waterloo in June 1999. Based on the record, the petitioner has not established that the beneficiary is among the group of six engineers tasked with more complex assignments that might involve specialized or advanced knowledge.

The petitioner also asserts that its "general engineers" have not received the specialized training in the company's proprietary products that is possessed by the beneficiary. The petitioner states that this training is not available "from conventional sources" in the United States and that it is not available to "general engineering employees," explaining that "an engineer is required to have completed additional training courses on the patented paper automation systems in order to be qualified for this particular position." These assertions are not persuasive for several reasons. First, as discussed above, the petitioner has provided no documentary evidence that the beneficiary has actually completed any training courses with the petitioner. Second, the course descriptions provided clearly state that the training classes are offered in "both the Atlanta and Toronto Training Centers," which directly contradicts the petitioner's statement that the training completed by the beneficiary is not available in the United States. Finally, based on the petitioner's representations, the AAO is expected to accept that training in the petitioner's systems is somehow unavailable to the company's "general engineers." However, it is simply not plausible that these courses are only available to the small select group of employees who are differentiated as having more advanced knowledge of the petitioner's systems. Each course appears to be only three to eight days long, and the AAO

assumes, and it has not been proven otherwise, that any similarly employed engineer in the company could progress, and most likely would be expected to progress, through the company's training program. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As noted in the 1994 memorandum cited by the petitioner:

[T]he mere fact that a petitioner alleges that an alien's knowledge is somehow different does not, in and of itself, establish that the alien possesses specialized knowledge. The petitioner bears the burden of establishing through the submission of probative evidence that the alien's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor. Likewise, a petitioner's assertion that the alien possesses an advanced level of knowledge of the processes and procedures of the company must be supported by evidence describing and setting apart that knowledge from the elementary or basic knowledge possessed by others. It is the weight and type of evidence which establishes whether or not the beneficiary possesses specialized knowledge.

Memorandum from James A. Puleo, Acting Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). Based on the minimal evidence submitted to establish the beneficiary's claimed specialized knowledge, and the failure to differentiate through submission of evidence the beneficiary's knowledge from that of other similarly employed engineers within the company, the petitioner has not established that the beneficiary's knowledge can be considered truly "specialized." Nor has the petitioner established that the beneficiary's knowledge is "advanced" such that it can be distinguished from the elementary or basic knowledge possessed by others within the petitioner's organization. Accordingly, the beneficiary may not be considered "key personnel."

The legislative history for the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary should be considered a member of the "narrowly drawn" class of individuals possessing specialized knowledge. *See 1756 Inc. v. Attorney General*, 745, F. Supp. 9, 16 (D.D.C. 1990). Based on the evidence presented, it is concluded that the beneficiary will not be employed in a specialized knowledge capacity in the United States. For this reason, the appeal will be dismissed.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.