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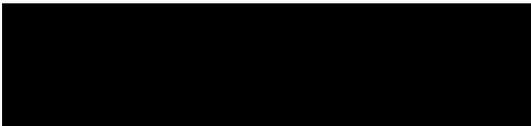
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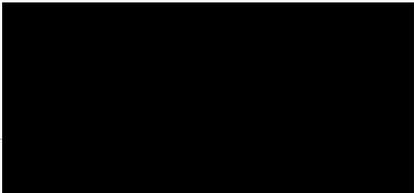
JUN 06 2005

FILE: WAC 03 063 55381 Office: CALIFORNIA SERVICE CENTER Date:

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

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

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

According to the evidence contained in the record, the petitioner was established in 2002 and claims to be engaged in the import and export of Indian artistic handicrafts. The petitioner claims to be a subsidiary of Kalavastu Exports, located in India. The petitioner's new office petition was initially approved allowing the beneficiary to enter the United States in an L-1A classification. It now seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager for an additional three years, at an annual salary of \$42,000.00. The director determined that the petitioner failed to submit sufficient evidence to establish that the beneficiary would be employed in a primarily executive or managerial capacity.

On appeal, counsel disagrees with the director's determination and asserts that the evidence establishes that the beneficiary will be employed in a primarily executive or managerial capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;
- B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed primarily in an executive or managerial capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily—

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of

the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily—

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner initially described the beneficiary's proposed job duties in the United States as: implementing policies and procedures, hiring, training and supervising new staff members, meeting with new clientele, and negotiating with clients and maintaining communication with the foreign entity partners of such negotiations.

In a letter of support, dated December 2, 2002, counsel described the beneficiary's proposed job duties as:

The beneficiary is and will be involved in establishing the company's long and short-term goals, establishing and implementing company policies, planning the strategic management of the company to ensure it's long term goals are met, directing the business activities, supervising all financial aspects of the company, directing and coordinating formulation of financial programs to provide funding for the company, seeking new investment opportunities, and negotiating, reviewing and approving contracts.

[The beneficiary] is responsible for planning and developing all aspects of the U.S. Corporation, making major decisions concerning management, sales, imports, and hiring of personnel. He is also in contact with the other partners of Kalavastu to discuss the overall progress of the expansion of the U.S. handicraft market.

....

[The beneficiary will] direct and coordinate activities of the current entity and import of products to maximize profits of the companies. Formulate and administer organization policies; participate in formulating and administering company policies and developing long-range goals and objectives. Will hire the appropriate management and staff to handle the U.S. Company.

....

Specifically, [the beneficiary] will spend approximately 70% of his time exercising his discretionary authority in managing professional staff members and client relations on behalf of Incense Garden, Inc. by conducting discussion with clients and the sales/managerial staff to identify client business problems and opportunities for Incense to solve those problems through improved system capabilities.

In addition to the development as indicated above, [the beneficiary] will spend approximately 30% of his time developing and conducting information on the trends of the product in the U.S. market, discussing with the partners in India and formulating policies and procedures.

Counsel identified the beneficiary's duties by restating the definition of managerial capacity as cited in 8 C.F.R. § 214.2(l)(1)(ii)(A). As evidence, the petitioner submitted a copy of the U.S. entity's organizational chart, which depicted the beneficiary as manager, with a sales manager, warehouse supervisor/clerk, and national sales agent as independent contractor under his direction. The petitioner submitted copies of the U.S. entity's IRS Form 1120, U.S. Corporate Income Tax Return for 2001, IRS Form 1120-W, Estimated Tax for Corporation for 2002, IRS Form 941, Employer's Quarterly Federal Tax Return for the quarters ending March 31, 2002, and June 30, 2002, and Form DE-6, Quarterly Wage Reports for the quarters ending March 31, 2002, June 30, 2002, September 30, 2002, December 31, 2002, and March 31, 2003. The petitioner also submitted photographs of the U.S. entity's premises' exterior and interior.

In response to the director's request for evidence on the subject, counsel described the beneficiary's job duties as:

- Directing the management of the [U.S. entity]. [The beneficiary] influences people's behavior through motivation, communication, group dynamics, leadership and discipline. While directing/managing the organization, [the beneficiary] not only tries to accomplish the organization's mission and objectives but also simultaneously helps the employees to accomplish their own career objectives.
- Planning: [The beneficiary] is involved in developing the business mission, objectives and goals and policies of [the U.S. entity] and in determining how they will be accomplished. [The beneficiary's] work in planning includes taking care of both the broadest view – setting out of [the U.S. entity's] overall growth strategy as well as the narrowest view, i.e. tactic to accomplish a specific goal like renting a place for the next venture.

- Decision making: [The beneficiary] has wide latitude in decision making in the following areas:
- Organizing — Establishing the internal organizational structure of [the U.S. entity], with particular focus on division, coordination, and control of tasks and the flow of information within the organization.
- Staffing — Filling and keeping filled with qualified people all positions in the business, including recruiting, hiring, training, evaluating and compensating.
- Controlling: Establishing performance standards from the point of view of consumers...measuring and reporting actual performance, comparing the two and taking corrective or preventative action as necessary.
- Enterprise Management: [The beneficiary] as the general manager completely manages [the U.S. entity] in coordination with the other managers and executives of the company. He will oversee and direct the expansion plans of the company, analyze market trends and ensure proper funding [is] available.

The director denied the petition after determining that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director noted that the petitioning entity's Form DE-6 indicated that for the quarter ending March 31, 2003, it employed a total of three employees and that currently the entity only employed the beneficiary and a sales manager. The director stated that based upon the number of employees employed by the U.S. entity and the \$350,443 in sales reported for the period ending September 30, 2002, it appeared that the beneficiary had been and would continue to perform the majority of day-to-day activities of the business. The director also stated that the petitioner had failed to establish that the organizational capacity of the U.S. entity was such as to be able to support a managerial or executive position. The director determined that the beneficiary's duty descriptions were so broad and general that they failed to define the actual duties to be performed by the beneficiary or the percentage of time to be taken in performing each task. The director concluded that the record did not contain sufficient evidence to demonstrate that the beneficiary would be managing the organization or a function thereof, or that he would be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties.

On appeal, counsel disagrees with the director's decision and argues that the beneficiary qualifies as a manager or executive. Counsel contends that the law specifically bars the number of persons supervised to be used as the sole basis for determining managerial or executive status. Counsel also contends that the significance of a function to be managed by the intracompany transferee should be taken into consideration in determining the beneficiary's eligibility. Counsel reiterates the subordinate employees' titles, educational achievements and position descriptions.

In evaluating whether the beneficiary is employed in a primarily managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the

beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9<sup>th</sup> Cir. July 30, 1991). In the instant matter, counsel stated that the beneficiary would be responsible for managing staff, negotiating contracts, client relations, marketing, and formulating policies and procedures. Counsel contends that the beneficiary will spend 70 percent of his time managing professional staff and client relations, and 30 percent of his time performing marketing duties and formulating policies and procedures. In review of the record, however, it appears that the beneficiary has been and will be primarily performing the day-to-day services of the business.

In order to qualify for an extension of a new office petition, the petitioner must establish that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The record demonstrates that the petitioning entity was established in 2001 as an import and export company and that it employed three persons at the time the petition was filed. Based upon evidence contained in the record, the petitioner is still in its developmental stages. Hence, the beneficiary has been and will continue to primarily perform the day-to-day services of the organization rather than perform primarily in a managerial or executive capacity.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include establishing company long-term and short-term goals, establishing and implementing company policies, planning the strategic management of the company, and directing the business activities. The petitioner did not, however, submit evidence of its goals and policies, or clarify how the beneficiary would direct the business activities of the organization. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Counsel is correct in stating that company size cannot be the sole basis for denying a petition. However, that element can nevertheless be considered, particularly in light of other pertinent factors such as the nature of the petitioner's business. Together, these factors can be used as indicators which help determine whether a beneficiary can remain primarily focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). It is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)

allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

At the time of filing, the petitioner was a one-year-old import and export company that claimed to have a gross annual income of \$500,000.00. The firm employed the beneficiary as general manager, plus a sales manager and a warehouse manager. The AAO notes that all of the employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as general manager and two other managerial employees. Further, based upon a review of the instant record, it appears that the warehouse manager has been employed on a part-time, as needed basis. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act.

Rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive and managerial capacity. *See* section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). For instance, the petitioner depicted the beneficiary as directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision-making. The beneficiary's duties are also described as managing the organization, managing an essential function within the organization, having the authority to hire and fire personnel, and exercising discretion over the day-to-day activities of the organization. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In addition, the petitioner describes the beneficiary as marketing the petitioner's product, maintaining customer relations, and being involved in the negotiating processes and financial aspects of the U.S. entity. Since the beneficiary actually negotiates the contracts, markets the petitioner's product, and performs administrative tasks, he is performing tasks necessary to provide a service or product. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although the petitioner asserts that the beneficiary will be responsible for managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. The petitioner claims that the beneficiary will be responsible for managing and supervising a sales manager and warehouse manager, and that the former possesses a Bachelor's Degree in Economics. Counsel described the sales manager's duties as: directs and coordinates the U.S. entity's sales department, the import and distribution of company stock, and the activities of the operation. Counsel further contends that the sales manager confers with administration personnel and

reviews daily activities and reports back to management with excel sheets. However, there has been no evidence submitted to establish that a bachelor's degree is necessary to perform administrative tasks. Neither has there been evidence submitted detailing the sales manager's duties or to demonstrate how much of his/her time is spent performing each task. In addition, there has been no evidence submitted to show that the warehouse manager is employed in a professional, supervisory, or managerial capacity or that he has obtained at least a bachelor's degree in any subject. Further, the evidence appears to demonstrate that the warehouse manager is employed by the U.S. entity on a part-time, as needed basis. The photographs submitted by the petitioner show a single office space to accommodate three employees. It appears from the record that the beneficiary has been and will be performing the day-to-day activities of the organization and supervising non-professional employees. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Even though the petitioner claims that the beneficiary directs and manages the petitioner's finance, marketing, and customer service activities, it does not claim to have anyone on its staff to actually perform the finance, marketing, or customer service function. Thus, either the beneficiary himself is performing the finance, marketing, and customer service functions or he does not actually manage such function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the finance, marketing, and customer service functions, the AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church of Scientology International, supra*.

Counsel claims that the beneficiary will be employed as a function manager for the U.S. entity. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If counsel claims that the beneficiary is managing an essential function, he/she must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, as is stipulated by the director in his decision to deny the petition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra*. In this matter, counsel has not provided evidence that the beneficiary manages an essential function. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaignena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In summary, the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in that the record fails to demonstrate the beneficiary will be managing professional, supervisory, or managerial staff who could relieve him from performing non-qualifying duties; that the beneficiary would be managing a function of the organization; that the beneficiary will be directing

the day-to-day activities of the organization; or that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, although counsel and the petitioner infer in the letter of support, dated December 2, 2002, that the beneficiary possesses specialized knowledge capabilities, Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). If the petitioner believed that the beneficiary was eligible for classification as an employee who possessed specialized knowledge, the petitioner was required to request such classification when filing the petition. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The petitioner cannot infer or request such a change subsequent to filing the petition. The AAO notes that, if the petitioner wishes to seek classification of the beneficiary as an L-1B intracompany transferee, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp.2<sup>nd</sup> 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests solely 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.