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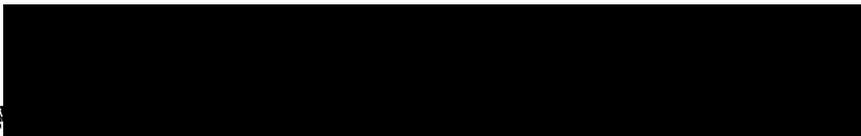
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: WAC 03 173 50945 Office: CALIFORNIA SERVICE CENTER Date: JUN 10 2005

IN RE: Petitioner:
Beneficiary:



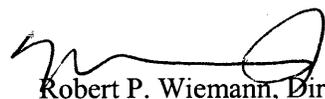
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

According to the documentary evidence contained in the record, the petitioner was established in 2000 and claims to be in the business of providing non-emergency medical transport services. The petitioner claims to be a subsidiary of Orient Express (Pvt.) Ltd., located in Lahore, Pakistan. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its executive manager/owner for three years, at an annual salary of \$60,000.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the evidence is sufficient to establish that the beneficiary will be employed in a primarily managerial or executive 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) 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 (1)(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 with 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 serves

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 this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity.

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

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

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) 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.

Initially, the petitioner described the beneficiary's duties as: "Owner of company. Sales of different product lines. Bottom line responsibility of profit centers, marketing of Travel product line. Training of employees. Development of new products. Set up new outlets/offices. Managed account receivables/risk management. General overall management." The petitioner described the beneficiary's proposed duties by stating that he would continue to serve as the company CEO "making all executive decisions regarding purchases and acquisitions, hiring, firing, training, business decisions etc."

Counsel described the beneficiary's duties in a letter of support, dated May 14, 2003, as:

[The beneficiary] falls squarely within the definition of both Executive and Manager. He is the President of the organization. He manages the entire organization. Presently, he allocated 50% of his time to Customer Servicing. This includes his discretionary authority in managing client relations by conducting discussions with clients and staff to identify client business problems and opportunities for improvement. He also spends 25% of his time to Marketing and Sales and 25% of his time to the management of accounts and to office business. He has complete authority to make all hiring and firing and promotional decisions and he exercises discretion over the day-to-day operations of the activity and functions for which he has authority. Additionally, [the beneficiary] establishes goals, policies and procedures for the company.

The beneficiary described his duties in a letter of support, dated May 7, 2003, as:

As with the overseas company, in my capacity as President of Orient Express Corporation in the U.S., I direct the management of the organization; establish the goals and policies of the organization and exercises [sic] wide latitude in discretionary decision-making.

Additionally, I manage the organization, supervise and control the work of other supervisors, professionals, or managerial employees. I retain sole authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised and I exercise discretion over the day-to-day operations.

The petitioner submitted copies of its IRS Form 941, Employer's Quarterly Federal Tax Return for the quarter ending December 31, 2002; IRS Form 940, Employer's Annual Federal Unemployment Tax Return for 2002; company profit and loss statement for the period July 2002 through January 2003; and bank statements covering the period of January 2003 through March 2003.

The director, in turn, requested the petitioner submit an organizational chart depicting the U.S. entity's hierarchy, a description of the beneficiary's duties in the United States, a detailed list of all U.S. company employees, Form DE-6, Quarterly Wage Report, and U.S. entity payroll summaries.

In response to the director's request for evidence, the petitioner described the beneficiary's duties as:

[The beneficiary] has three basic duties to perform:

1. President-Head of Corporation.
2. Responsible for Sale & Marketing of the company.

3. Responsible for Financial management of the corporation.

Description:

Head of Corporation

- A. Being head of corporation he decides and hire [sic] people for his company.
- B. He decides what and when to add assets of the company. He has successfully added 2 ambulances to the business.
- C. He is responsible for over all success and profitability of corporation.

Responsible for Sales & Marketing of company.

- A. Responsible for developing customer base and regular contract with the existing customers.
- B. Have successfully grown company's business by 5 times in a short period of 1 year and have brought in numerous new customers to company's profolio [sic].
- C. Have worked on ongoing basis to build company's level of service to patients/customers and have successfully build [sic] company's image in the market place.
- D. Have successfully solicited business of large hospital chains such as Mercy Hospitals....

Financial Management of the corporation.

- A. Fully responsible for the health of the corporation.
- B. Fully responsible for billing to customers including the State (Medi-Cal).
- C. Fully responsible for timely payments to vendors/suppliers & creditors.
- D. Fully responsible for the profitability of corporation [sic].

The petitioner submitted a list of employees, which showed that the U.S. entity employed the beneficiary as president, with a volunteer office assistant [redacted] in charge of the company's billing, a dispatcher/driver [redacted] and two additional drivers [redacted] in his direction. The petitioner described the employees' job duties in part as:

President: Responsible for Sales & Marketing.
 Hiring & firing of employees.
 Corp's operation & Customer servicing.
 Financial Management & Profitability of corp.

* * *

Billing in charge/
 Office Assistant: Responsible for a company's billing to clients including State [of] California.
 Responsible for approvals from the State for each client/patient.
 F1 Visa holder working as a volunteer.

- Dispatcher/Driver (1): Responsible for dispatching vehicles to patients.
Responsible to pick & drop [sic] patients as per schedule of the day.
Permanent Resident. Estimated annual wages \$20000 to 25000
- Driver (2): Responsible to pick & drop [sic] patients as per schedule.
American National. Estimated annual wages \$20000
- Driver (3): Responsible for pick & drop [sic] of patients as per schedule.
Work permit holder. Estimated annual wages \$20000

The petitioner explained in the organizational chart that had job openings for a manager of operations, a sales executive, and another driver. The petitioner submitted copies of its Quarterly Wage and Withholding Reports for the quarters ending September 30, 2002, December 31, 2002, and March 31, 2003; IRS Form 941, Employer's Quarterly Federal Tax Return and attachments for the quarter ending June 30, 2003; and payroll summaries covering the period of July 2002 through March 2003. The petitioner also submitted copies its IRS Forms W-2 and W-3 for the years 2001 and 2002; IRS Form 1120, U.S. Corporation Income Tax Return, for the year 2002; California State Tax Return, Form 100 for the year 2002; and company bank statements. The petitioner submitted a list of its employees including their names, job titles, dates of employment and salary/wages.

The director subsequently denied the petition stating that the record contained insufficient evidence to demonstrate that the beneficiary would be employed, primarily, in a managerial or executive capacity. The director noted that the U.S. entity employed the beneficiary and three subordinate employees at the time the petition was filed. The director also noted that the company's IRS Form 1120 showed salaries and wages paid to employees for 2002 in the amount of \$27,216.00. The director also stated that given the fact that the three bottom tier employees are involved in the billing, dispatch and driving of ambulances, it would stand to reason that the beneficiary is performing the sales and marketing, operations, and customer services duties, rather than managing or directing the same. The director further determined that the majority of the beneficiary's duties would entail performing the day-to-day activities of the organization. The director concluded that the petitioner had failed to demonstrate that the beneficiary would be employed in a managerial or executive capacity and that the U.S. entity realistically required a manager or executive given the overall purpose and stage of development of the organization.

On appeal, counsel disagrees with the director's decision and asserts that the decision was arbitrary in that Citizenship and Immigration Services (CIS) had approved the initial petition qualifying the beneficiary for L-1A status, and had also approved an extension of status petition. Counsel further asserts that the company has tripled its revenue and salaries since the first year of operation, and that the company has since hired a quality control officer and an operations manager who relieve the beneficiary from performing the day-to-day activities of the organization. Counsel contends the beneficiary directs the management of the organization, establishes goals and policies, and receives no supervision from higher-level executives. Counsel also contends that the beneficiary manages mid-tiered employees who are in managerial positions. Counsel describes the beneficiary's duties as:

[The beneficiary] is the president of the organization. He manages the entire organization. Presently, he allocates most of his time to the hiring, training and supervision of his mid-tiered personnel. He also has discretionary authority in managing client relations by

conducting discussions with clients and staff to identify client business problems and opportunities for improvement. He also spends a portion of his time on marketing and sales. He has complete authority to make all hiring and firing and promotional decisions and he exercises discretion over the day-to-day operations of the activity and functions for which he has authority. Additionally, [the beneficiary] establishes goals, policies and procedures for the company.

Counsel argues that the U.S. entity has realized substantial growth by starting out slowly and by initially hiring volunteers and trainees. Counsel further argues that the salary and wages amount (\$27,216.00) mentioned by the director in his decision is moot in that paid compensation to officers and salaries and wages to employees has grown by almost 200 percent since. Counsel concludes that the U.S. entity has realized a strong upward growth that two company positions have been filled by mid-tier managers since the petition was filed, and that the salaries paid out to employees in the past five months have totaled \$43,455.00.

On appeal, the petitioner submits an organizational chart that depicts the U.S. entity's hierarchy. The chart shows the beneficiary as president, with an operations manager, quality control officer, billing volunteer, dispatcher/driver, and two additional drivers under his direction. The petitioner submits job descriptions for the quality control officer and the operations manager who were purportedly hired in December and October 2003 respectively. The petitioner submits a company profit and loss statement covering the period January through November of 2003, and copies of company payroll checks.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. In the instant matter, the petitioner asserts that the beneficiary will be employed as the company's president and executive manager. In both letters of support, dated May 7, 2003, and May 14, 2003, counsel and the petitioner indicate that the beneficiary will be responsible for directing the management of the organization, establishing goals and policies, and managing subordinate employees. Counsel asserts that the beneficiary will allocate 50 percent of his time to "customer servicing," 25 percent of his time to "marketing and sales," and 25 percent of his time to "management of accounts and office business." However, neither the petitioner nor counsel has clearly stated why the beneficiary's proposed duties should be considered managerial or executive in nature. Further, on appeal counsel claims that the beneficiary allocates most of his time to the hiring, training and supervision of his mid-tiered personnel. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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 (9th Cir. July 30, 1991). In the instant matter, there has been insufficient evidence and/or explanation given to establish that the beneficiary has and will perform high-level responsibilities

characteristic of a managerial or executive position. To the contrary, it appears that the beneficiary has been and will continue to primarily perform the day-to-day sales, marketing, and customer relations functions of the organization.

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 managing the marketing, sales, and customer service divisions. The petitioner also asserted that the beneficiary, as president, would direct the management of the U.S. entity, establish goals and policies, exercise a wide latitude in discretionary decision making, and receive no supervision from other executive authorities. The petitioner did not however, define the beneficiary's policies or goals, or adequately detail how the beneficiary oversees the marketing, sales, or customer service divisions. It is noted by the AAO that the record clearly indicates that at the time the petition was filed, the petitioning entity only employed subordinates to assist in billing, dispatching, and driving of the company's ambulances. 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).

The petitioner has failed to overcome the objections made by the director. Rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of managerial and executive capacity. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). For instance, the petitioner described the beneficiary as managing the entire operation, hiring, firing, and supervising the work of others, exercising discretion over the day-to-day operations, establishing goals and policies of the organization, and exercising sole discretionary decision-making authority. 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. v. Sava*, *supra*; *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner asserted that the beneficiary possessed discretionary decision making authority, to employ the company's workforce, to issue price quotes, to control allocation of goods and services, and to create new business opportunities. However, there has been no independent documentary evidence submitted to substantiate this claim. Based upon the evidence submitted it appears that the beneficiary's authority is limited in scope and does not rise to the level of managerial or executive capacity. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

As noted above, the petitioner claims that the beneficiary directs and manages the petitioner's sales, marketing, and customer service activities, however, there has been insufficient evidence submitted to demonstrate that anyone on its staff actually performs the sales, marketing, and customer service functions. The petitioner submitted a copy of the U.S. entity's 2002 IRS Form 1120, which did not demonstrate that the company paid any compensation to officers other than the beneficiary and paid limited salaries and wages to other employees in that year. In addition, the petitioner submitted copies of the California State Form DE 6

for the quarter ending March 31, 2003, which demonstrated that the U.S. entity had four individuals on its payroll, however, only one of the four employees appeared to be employed on a full-time basis. Furthermore, the petitioner's description of the subordinates' duties such as "billing to clients," "dispatching vehicles to patients," and "pick & drop patients as per schedule" is too vague to demonstrate that the duties entail managerial responsibilities or that they directly relate to the sales, marketing, and customer service functions of the organization. Thus either the beneficiary himself is performing the sales, marketing, and customer service functions or he does not actually manage the sales, marketing, and customer service functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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 sales, 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*.

Although counsel asserts that the beneficiary is 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. Counsel asserts on appeal that the petitioning entity hired an operations manager in October of 2003 and a quality control officer in December of that same year. The AAO notes that the petition in the instant case was filed on May 19, 2003. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Based upon a review of the record, it appears that none of the beneficiary's subordinates are managers, supervisors, or professionals. 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 will be primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

The petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material 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*, *supra*. 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 a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions 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).

It is inferred throughout the petition that the U.S. entity is still in its developmental stages and will continue to experience upward growth, and that it intends to hire additional personnel in the future. In fact, the evidence demonstrates that the petitioning entity hired two additional employees subsequent to the filing of the petition. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp., supra*. The petitioner has not 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, the minimal documentation of the parent company's business operations raises the issue of whether there is a qualifying relationship between the U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, there is insufficient evidence contained in the record to demonstrate that the foreign entity will continue doing business as defined by the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H). The record fails to show that the foreign entity has been or will be engaged in the regular, systematic, and continuous provision of goods and/or services during the beneficiary's temporary stay in the United States. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For these additional reasons, the petition may not be approved.

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.2nd 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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.