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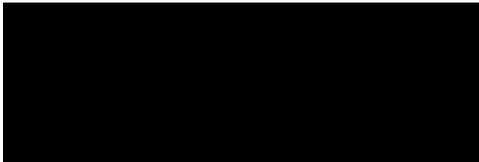
D7

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAY 23 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

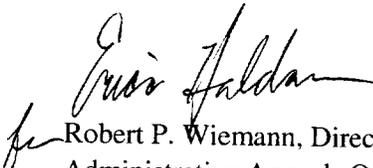
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


for Robert P. Wiemann, Director
Administrative Appeals Office

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

It is noted that the beneficiary was in removal proceedings at the time of filing and was given a voluntary departure order on November 26, 2002 (See [REDACTED]). If the beneficiary remains in the United States, the director may choose to refer this record to the local district office for review.

The petitioner, [REDACTED], claims to be a branch of G.M.C., S.A. DE C.V., located in El Salvador.¹ The petitioner plans to operate a courier and import and export business and claims to have six employees. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office. Accordingly, on November 22, 2002 the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for one year. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's manager.

On February 28, 2003, the director denied the petition. The director determined that the petitioner failed to establish that sufficient physical premises had been secured for the new office and that within one year of approval, the beneficiary will be employed in a primarily executive capacity.

On appeal, the petitioner's counsel submits a motion for reconsideration² and asserts that the facts "will clearly show that sufficient premises have been secured for the new office." Counsel further claims that the beneficiary is "currently managing all essential functions within the organization and that he will continue to do so, and that, within one year of commencing operation, the executive will be supervising the work of other managerial and supervisory (but not professional) staff."

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. 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. Furthermore, 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.

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

¹ The AAO notes that although the petitioner submitted a copy of its articles of incorporation, stock certificates, an application for an employer identification number, and stock ledger, it is unclear as to when the petitioner was actually incorporated.

² The director declined to treat the appeal as a motion and forwarded the appeal to the Administrative Appeals Office (AAO) for review.

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (I)(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's prior year of employment abroad 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.

(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.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The first issue in this proceeding is whether the petitioner has secured sufficient physical premises to house the new office.

Initially, the petitioner submitted insufficient evidence to establish that it had secured sufficient physical premises to house the new office. Consequently, on November 29, 2002, the director requested that the petitioner submit a copy of the lease agreement for the U.S. entity and photographs of the interior and exterior of the premises that had been secured to house the new office.

In response, the petitioner submitted a copy of a lease agreement and copies of photographs of the interior and exterior of the premises. The lease was for the premises located at [REDACTED] indicating that it was entered into for the period beginning on December 1, 1999 and expiring on November 30, 2000. The lease was made between the [REDACTED] and the Lessee, [REDACTED] Landscape Services. The lease specifically stated that the "Lessee will not use said premises for any other purposes that those of a one family dwelling; that said Lessee will not assign or sublet without the written consent of the Lessor." The lease does not indicate the square footage of the space to be rented. The petitioner also submitted a bank statement listing a different address than what appeared on the lease agreement.

On February 28, 2003, the director denied the petition. The director determined that the petitioner failed to establish that sufficient physical premises had been secured for the new office.

On appeal, the petitioner's counsel states that the facts "will clearly show that sufficient premises have been secured for the new office" Counsel submits a ratified lease agreement and a bank statement for February 2003 which shows the same address as the lease agreement. The lease indicated that the agreement was made and entered into for a term of one year beginning on December 15, 2002. The agreement was signed by the lessor and the petitioner on March 13, 2003. The lease does not indicate the square footage of the space to be rented. Counsel states that the lease agreement was ongoing but had not previously been "reduced to a written agreement." Counsel further asserts that the beneficiary received some bank statements at his residential address, and contends that neither the discrepancy on the bank statements nor the lack of a written lease were valid reasons for concluding that the petitioner did not have sufficient physical premises.

On review, the petitioner failed to establish that it has secured sufficient physical premises to house the new office as required by the regulations at 8 C.F.R. § 214.2(1)(3)(v)(A). In response to the request for additional evidence, the petitioner submitted a lease agreement which commenced on December 1, 1999 for a term of one year that restricted the lessee from operating a business by stating that the "Lessee will not use said premises for any other purposes that those of a one family dwelling; that said Lessee will not assign or sublet without the written consent of the Lessor." The petitioner was not a party to this agreement and there was no indication that there was an authorized assignment or sublet of the premises to the petitioner or that the premises could be used for operating a business. Therefore, at the time of filing on November 22, 2002 and in the response to the director's request for additional evidence, the petitioner had not established that it secured a physical premise to house the new office. 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.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Moreover, the petitioner submits a new lease on appeal. The new lease indicated that it was for a term of one year commencing on December 15, 2002, although the agreement was executed on March 13, 2003. However, 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). In addition, the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Moreover, the director requested that the petitioner submit photographs of the interior and exterior of the new office. The copies of the pictures are unclear and appear to depict a generic scene of a single-family house with no identifying address. It is also difficult to ascertain whether there is a sufficient amount of space to operate a courier and import and export business. The petitioner has not described its anticipated space requirements for its courier and import and export business and the leases in question do not specify the amount or type of space secured. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the beneficiary's proposed U.S. employment will involve primarily executive or managerial authority over the new operation.

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.

In a November 20, 2002 letter, counsel for the petitioner described the beneficiary's proposed U.S. duties as:

[The Beneficiary] will be directing the start-up of the U.S. enterprise. He will procure the contracts, he will hire the staff to establish US operations, he will direct the management of the US enterprise and establish its goals and policies without supervision thereof. The [b]eneficiary is qualified for the position by virtue of his previous management experience, and unique knowledge of the Salvadorian community.

On November 29, 2002, the director requested that the petitioner submit a business plan describing the employees who will be working for the U.S. company and a detailed description of their duties and educational credentials.

In response, the petitioner submitted a three-page business plan describing its plan of activities and a description of its proposed employees and their duties. The petitioner described the staffing of the U.S. entity to include the beneficiary as the general manager, his assistant, an office manager and receptionist, and up to six couriers. The beneficiary's duties were described as the following:

Oversee company operations, formulate and implement business plan. Meet with accountant, lawyer and bank representatives. Oversee customer relations, take

orders, purchase airline tickets and supervise and pay staff. As the company grows, this position will evolve into an exclusively managerial one – the General Manager will delegate most of the day to day operational duties to the office manager(s) and other office staff and will focus on marketing and expanding the company and overseeing the operations and staff.

On February 28, 2003, the director denied the petition. The director determined that the petitioner failed to establish that within one year of approval, the new office will support an executive or managerial position. The director found that the beneficiary will not supervise the work of managerial, professional, or supervisory employees, and that he will be primarily performing the non-managerial, operational tasks of the business.

On appeal, the petitioner's counsel asserts that the beneficiary is "currently managing all essential functions within the organization and that he will continue to do so, and that, within one year of commencing operation, the executive will be supervising the work of other managerial and supervisory (but not professional) staff." Counsel reiterates the beneficiary's job description and asserts that he will primarily be engaged in expansion activities by the end of the first year of operations.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the beneficiary's job description lacks specificity and is vague. The petitioner described the beneficiary's proposed duties as: "procure the contracts," "hire the staff to establish US operations," "direct the management," and "establish its goals and policies without supervision." However, the beneficiary's described duties do not clearly indicate what specific duties the beneficiary will primarily perform. The petitioner also indicated that the beneficiary will "focus on marketing and expanding the company " but does not identify any employees who would relieve the beneficiary from performing routine marketing tasks, or identify any specific managerial tasks related to business expansion. Specifics are clearly an important indication of whether a beneficiary's duties will be 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).

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The brief business plan submitted by the petitioner also lacks specificity. In examining the business plan, the precedent decision, *Matter of Ho*, 22 I&N Dec. 206, 213 (Imm. 1998), lists possible criteria for establishing an acceptable business plan. "The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions." The decision concluded, "Most importantly, the business plan must be credible." *Id.* at 213. Although *Matter of Ho, Id.*, addresses the specific requirements for the immigrant investor visa classification, the discussion of the business plan requirements is instructive for the L-1A new office requirements. In this matter, the petitioner has failed to clearly establish the need for a managerial or executive position by the end of its first year of operations. For example, the petitioner stated that the "company's primary purpose is to provide personalized and secure delivery service to our community" and "the company personally delivers the packages." However, it is unclear how the company will achieve these goals. In addition, the petitioner's business plan indicates that the company does not intend to hire delivery couriers or commence import and export activities until July 2003, eight months after the petition was filed, which undermines the petitioner's assertions that the business can reasonably be expected to move beyond the developmental stage by the end of its first year of operations. Thus, given the business plan's generalities and the petitioner's projected timetable for expansion of its operations, it cannot demonstrate whether the new office will support a manager or executive within one year of filing this petition.

Counsel claims that the director focused on the number of subordinate staff to be supervised by the beneficiary but failed to consider that the beneficiary is clearly the functional manager of the entire company. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead will be 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). Here, the petitioner claims that the beneficiary will manage "all essential functions within the organization." However, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties that will be attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary will manage the function rather than primarily perform 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*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function.

The AAO notes that although counsel cites previous AAO decisions to support the petitioner's claim that the beneficiary manages the organization, these decisions are unpublished and are not binding. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the act, unpublished decisions are not similarly binding. Counsel also did not provide the AAO with a copy of these decisions.

Finally, the AAO also notes that at the time of filing the petition on November 22, 2002, the petitioner indicated on the Form I-129 that the beneficiary was coming to the U.S. to serve in an

executive or managerial capacity. However, on appeal, counsel claims, “In the alternative, the beneficiary’s specialized knowledge of the company’s products and procedures based on his ten years of experience managing the Salvadorian branch clearly qualify him for an [REDACTED] visa as an inter-company transferee with specialized knowledge.” Therefore, counsel offers an alternative position if the beneficiary fails to qualify for an L-1A visa. Counsel’s request to amend the petition on appeal is not properly before the AAO. 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 request to reconsider the original petition on appeal as a petition for L-1B specialized knowledge classification is, therefore, rejected.

Based on the above discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year as required by 8 C.F.R. § (1)(3)(v)(B) & (C) or that the new office will support such a position. Beyond the decision of the director, the AAO finds that the petitioner failed to establish that the beneficiary has been employed in a qualifying managerial or executive capacity abroad as defined at section 101(a)(44) of the Act. As previously stated, to establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must submit evidence that within three years preceding the beneficiary’s application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *Id.* The petitioner provided a limited and vague description of the beneficiary’s foreign duties. For example, on the Form I-129, the petitioner stated that the beneficiary “[o]verses accounts, daily operations, and public relations,” “[s]upervise[s], hire[s] and train[s] staff,” and “design[s] and implement[s] marketing and sales strategies.” These duties are vague and do not establish that the beneficiary has been employed abroad in a qualifying managerial or executive capacity. It is unclear how the beneficiary served in either of those capacities. 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)). In sum, the AAO is not persuaded that the beneficiary has been employed in a primarily managerial or executive capacity abroad. For this additional reason, the petition may not be approved.

Beyond the decision of the director, another issue to be addressed is whether there is a qualifying relationship between the petitioner and foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). On the Form I-129, the petitioner indicated that it was a branch of the foreign entity. However, it submitted evidence that it was incorporated. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee “to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity].” 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations

define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office).

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. The petitioner claims that both entities are owned in equal proportions by the same two individuals, which if supported by credible evidence, would establish an affiliate relationship. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. In this matter, the stock certificates and stock ledger indicate that the beneficiary and [REDACTED] each owned 500 shares of the U.S. company. The petitioner also claimed that the beneficiary and [REDACTED] own the foreign entity in equal shares. In support of this assertion, the petitioner submitted the foreign entity's company constitution and copies of two stock certificates. The Constitution, dated November 28, 1992, indicates that the company issued 1,000 of its 2,000 shares to the beneficiary and 1,000 shares to [REDACTED]. However, the share certificates indicate that the beneficiary received certificate number one for 500 shares on

Dec. 28, 1992 and [REDACTED] received stock certificate number five for 500 shares on the same date. The petitioner did not provide stock certificates numbered two, three, and four or the foreign entity's stock ledger, nor did it explain the inconsistency regarding the number of shares issued to the beneficiary and [REDACTED]. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason, 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. 2d 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.