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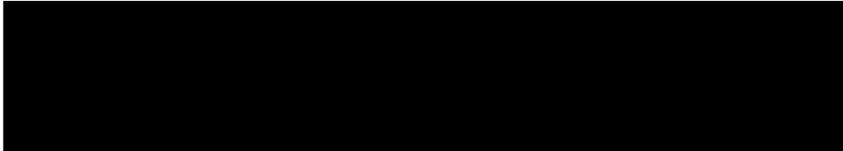
File: EAC 02 220 50528 Office: VERMONT SERVICE CENTER Date: **AUG 03 2007**

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequently filed appeal. The matter is now before the AAO on a motion to reconsider. The AAO will grant the petitioner's motion and affirm its previous decision.¹

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New Jersey corporation, states that it is engaged in the export of trucks and related automotive items. The petitioner claims that it is the subsidiary of El Sol Norteno S.R.L., located in Argentina. The beneficiary was initially granted a one-year period in L-1A classification in order to open a new office in the United States, and subsequently received a one-year extension of stay. The petitioner now seeks to extend the beneficiary's L-1A status for three additional years.

The director denied the petition on December 5, 2002, concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The AAO dismissed the petitioner's subsequently filed appeal on February 11, 2004, affirming the denial of the petition on these grounds.

The petitioner filed the instant motion to reconsider on March 16, 2004. On motion, counsel for the petitioner asserts that the Director and the AAO improperly excluded evidence presented subsequent to the filing of the petition. Counsel contends that the petitioner did not make any material changes subsequent to filing nor did it seek to rely on any facts that came into being subsequent to filing. Counsel asserts that the evidence of record clearly establishes that the beneficiary has been and will be employed in a primarily managerial or executive capacity and will not be engaged in performing the petitioner's sales and services, as concluded by the AAO. Counsel submits a brief and additional documentary evidence in support of these claims.

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

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or

¹ The AAO initially rejected the petitioner's motion as untimely filed without rendering a decision on August 9, 2005. The petitioner has since provided documentary evidence and explanation sufficient for the AAO to accept the motion filed on March 16, 2004 as timely.

petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The sole issue to be addressed is whether the petitioner established that the beneficiary will be employed by the U.S. company in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

The nonimmigrant petition was filed on June 17, 2002. The petitioner indicated that the beneficiary would serve as president with responsibility to "formulate company policy and goals; implement policy, run operations." The petitioner indicated that it had five employees at the time of filing, and provided copies of three IRS Forms W-2 for 2001, showing total salaries of \$19,940. The petitioner did not further describe the beneficiary's duties or the company's organizational structure.

On July 12, 2002, the director requested additional evidence to establish that the beneficiary would be performing the duties of a manager or executive. Specifically, the director instructed the petitioner to provide: (1) a copy of the U.S. company's organizational chart, clearly identifying all employees who report to the beneficiary by name and job title; (2) a brief description of job duties for all employees under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties in the United States, and the percentage of time spent in each of the listed duties; and (4) copies of the U.S. company's payroll summary and 2001 Form W-3 evidencing wages paid to employees.

In a response dated October 3, 2002, the petitioner submitted an organizational chart for the U.S. company which depicts the beneficiary as president, with responsibility for supervising a sales manager, an administrative assistant, and a chief mechanic. The duties of the positions were described as follows:

President: Makes major company decisions. Oversees and supervises all business operations.

Sales Manager: Supervises sales and transactions, public relations (\$800.00/month)

Administrative Assistant: Assists with administrative tasks, conducts daily office operations, makes purchases (\$460.00/month)

Chief Mechanic: Maintains company fleet and mobilizes units to different locations.

The petitioner's New Jersey Form WR-30, Employer's Report of Wages Paid, for the second quarter of 2002 confirmed the employment of the three employees named on the organizational chart.

The director denied the petition on December 5, 2002, concluding that the evidence submitted was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director emphasized that the petitioner had not provided the requested complete description of the beneficiary's duties or those of his subordinate employees, or a breakdown of how each employee allocates his or her time on a weekly basis. The director found that the beneficiary's duties were too vague to establish the actual duties to be performed. The director further found the record did not clarify who was actually providing the goods and services of the company, and found that "it seems likely the beneficiary performs these duties." The director concluded that the petitioner had not shown that the beneficiary operates at a senior level in the organization other than in position title, or that he would be involved in the supervision of managerial, supervisory or professional personnel who would relieve him from performing the services of the corporation.

On appeal, counsel for the petitioner argued that the beneficiary is employed in an executive capacity, and noted that the staffing level of the organization is reasonable given the nature of the business. Counsel emphasized the petitioner's growth in sales, inventory and payroll in 2002, noting that such success was as a result of the beneficiary's executive leadership. Counsel stated that the beneficiary: "directs the management of the company, establishes the goals and policies, and exercises complete discretionary decision making without any direct supervision." Counsel provided a brief job description for the beneficiary, noting his responsibility to make major decisions related to "policies financing, staff management, marketing," his authority to define the company's goals and objectives, and his supervision of sales and oversight of customer accounts.

Counsel also objected to the director's conclusion that the beneficiary participates in the day-to-day operations activities of the company, and asserted that the sales manager, administrative assistant and chief mechanic, and newly hired account executive perform such non-qualifying duties. Counsel alleged that a job description for each employee was submitted in response to the director's request for evidence and referred to the organizational chart in support of his claim. The petitioner submitted documentary evidence in support of the appeal, including an updated organizational chart for the company showing its structure as of February 2003, as well as evidence of wages paid to employees during the second half of 2002. Finally, the petitioner submitted copies of recent sales invoices signed by the U.S. company's sales manager to refute the director's conclusion that the beneficiary is engaged in sales duties.

The AAO dismissed the petitioner's appeal in a decision dated February 11, 2004. The AAO did not consider the new evidence offered on appeal, citing several decisions in support of the proposition that a petitioner must establish eligibility as of the date of filing the petition. The AAO also emphasized that the petitioner may not offer on appeal evidence that was previously requested in a request for evidence. The AAO therefore adjudicated the appeal based on the evidence in the record at the time of the director's decision.

The AAO found insufficient evidence of the duties performed by the beneficiary or by his subordinates, and also noted that the record did not support a finding that the beneficiary's subordinates were employed on a full-time basis.

On motion, counsel for the petitioner asserts that the beneficiary has been employed by the U.S. company as an executive since his entry to the United States in L-1A status, and as such he "establishes the goals and directs the management of the company," and exercises "complete latitude in discretionary decision making." Counsel asserts that the director and the AAO improperly failed to consider the petitioner's 2002 income tax return and quarterly wage reports for 2002 which were not available at the time of filing, and which are supportive of the petitioner's claim that the business has increased substantially in sales volume, profits and payroll.

Counsel asserts that the beneficiary did meet the statutory requirements for approval at the time of filing based on the approval of a previous extension of his L-1A status, and based on evidence supplied at the time of filing and in response to a subsequent request for evidence. Counsel submits that the evidence submitted on appeal was not "new evidence" but "an explanation and further elucidation of the evidence already presented." Counsel contends that the petitioner did not make any material changes subsequent to the filing or seek to rely on facts that came into being subsequent to filing.

Counsel further objects to the AAO's conclusion that the majority of the beneficiary's job duties entail providing sales and services on behalf of the petitioner, and notes that the record "clearly shows that the Sales Manager and service staff handle those duties." Counsel disputes the AAO's determination that the record does not clearly show what goals and policies are developed by the beneficiary, and asserts that "it is clearly established that the beneficiary is the 'boss', he owns 100% of the stock of the company and makes the executive decisions." In addition, counsel states that it was clearly stated that the beneficiary spends 100% of his time in managerial and executive tasks, and therefore counsel objects to the finding that the petitioner did not supply a breakdown of the percentage of time the beneficiary spends on managerial and non-managerial tasks.

In support of the motion, the petitioner submits: (1) an updated organizational chart apparently reflecting the petitioner's 2004 staffing levels; (2) evidence of the petitioner's payments to employees and payment of employment taxes for 2003; (3) a graph comparing the petitioner's sales, inventory, salaries and taxes over the years 2000 through 2003; (4) copies of the petitioner's 2002 state and federal income tax returns; (5) copies of sales invoices dated from March 2003 through February 2004; (6) evidence of purchases made by the U.S. company in 2003 and 2004; (7) 2003 and 2004 bank statements; and (8) investment agreements executed between the petitioner and four private investors in 2003.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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.*

Here, the petitioner has repeatedly 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. The petitioner initially indicated that the beneficiary would "formulate company policy and goals; implement policy, run business." This description was appropriately deemed insufficient to meet the petitioner's evidentiary burden to clearly describe the duties to be performed. Accordingly, the director issued a request for additional evidence in which the petitioner was instructed to "submit a more detailed description of the beneficiary's duties," to "be specific," and to "indicate the percentage of time spent in each of the listed duties." The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Here, the evidence was critical, as the initial description of the beneficiary's duties failed to describe the actual tasks to be performed by the beneficiary.

Although the petitioner submitted a voluminous response to the director's request for evidence, the request for a specific, detailed description of the beneficiary's duties, with a breakdown of the percentage of time the beneficiary spends on each duty, was ignored. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Instead, the petitioner incorporated another brief, vague characterization of the beneficiary's responsibilities into the company's organizational chart, noting that the beneficiary: "Makes major company decisions. Oversees and supervises all business operations." Generalized statements regarding the beneficiary's responsibilities, such as "run business" and "supervises all business operations," are not sufficient to establish the beneficiary's employment in a managerial or executive capacity. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO will not accept vague, unsupported statements regarding the beneficiary's claimed managerial or executive authority and speculate as to the related qualifying tasks and the proportion of time dedicated to such tasks. A beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of broadly-cast job responsibilities.

The deficiency of the position description submitted for the beneficiary was clearly noted in both the director's decision and the AAO's decision, and the petitioner has therefore had two subsequent opportunities to supplement the record with a clear account of the actual duties performed by the beneficiary on a day-to-day basis as president within the context of the petitioner's business as a purchaser, exporter and re-seller of used trucks and automotive equipment. However, neither counsel nor the petitioner has sought to clarify the beneficiary's duties on appeal or on motion. Counsel's subsequent descriptions of the beneficiary's duties have merely paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Contrary to counsel's assertions on appeal and motion, the two-sentence job description included in the petitioner's organizational chart was not responsive to the director's request for a detailed, specific description. Counsel's claims that the beneficiary is "the boss" and therefore qualifies as an executive for the purposes of this visa classification are a poor substitute for a description of the beneficiary's actual job duties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

The definitions of executive and managerial capacity have two specific requirements. 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). Here, while the AAO does not doubt that the beneficiary exercises discretion over the U.S. company as its shareholder and president, the record does not establish whether he spends the majority of his time on managerial or executive functions, because the record does not establish what the beneficiary does on a day-to-day basis.

Counsel's blanket assertion that the beneficiary spends 100 percent of his time on managerial and executive duties is not corroborated by the evidence of record. Therefore, although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial or executive in nature, and what proportion is actually non-managerial or non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

For example, both the director and the AAO noted in their decisions that it was not clear who performed the sales operations of the petitioning company at the time the petition was filed. It appears that this conclusion was drawn based on the petitioner's claim that it employs a "sales manager" to supervise sales and purchasing transactions, but no sales representatives. On appeal and on motion, counsel asserts that the sales manager's signature on the petitioner's sales invoices, sales agreements and purchase orders is evidence that the sales manager in fact relieves the beneficiary from performing these non-qualifying duties. However, the AAO notes that all of the documents bearing the sales manager's name and signature are dated in 2003 and 2004. Similar documents submitted at the time the petition was filed bear the beneficiary's name and signature, therefore the evidence does not support a conclusion that the beneficiary was relieved from performing sales and purchasing duties as of June 2002, when the petition was filed.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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).

At the time of filing, the petitioner was a two-year-old company engaged in the purchase, export, and domestic sales of used trucks, automotive parts and related equipment. The record establishes that the petitioner employed the beneficiary as president, a sales manager, a mechanic and a part-time administrative assistant. It reasonably requires personnel to locate, select and purchase vehicles, to prepare vehicles for re-sale, to keep records of purchases and sales, to document title transfers, to set up the terms of financing and collect payments, to assist customers with sales and complete sales transactions, to locate foreign buyers for exports, to arrange domestic transport of vehicles and to coordinate export activities, to market and advertise the petitioner's business, to perform bookkeeping and banking operations, and to perform administrative and clerical duties associated with operating any business. The petitioner has not established that one sales person, one mechanic and one part-time administrative employee are able to perform all of the non-managerial duties associated with the petitioner's business, particularly as the photographs submitted suggest that the petitioner maintains a lot offering on-site sales that is presumably staffed during business hours.

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) of the Act. As discussed above, the petitioner has not established this essential element of eligibility due to its failure to submit a comprehensive description of the beneficiary's duties.

On motion, counsel asserts that the AAO improperly excluded evidence offered on appeal which demonstrates the petitioner's continuous growth under the beneficiary's leadership. However, the petitioner's modest increases in gross income and payroll between 2001 and 2002 are insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. The fact that the petitioner paid total wages of only \$24,030 in 2002 only raises further questions as to whether the subordinate staff is able to relieve the beneficiary from performing non-qualifying duties. The AAO notes that the petitioner's payroll decreased to two employees for two or more months during the second half of 2002, and in the quarter immediately following the filing of the petition, the petitioner reported that the sales manager worked for only eight weeks and the administrative manager worked for only four weeks. Had this evidence been considered on appeal, the AAO would have reached the same conclusion.

The AAO acknowledges that the petitioner hired additional employees subsequent to its response to the director's request for evidence, and now claims to staff the positions of sales representative and accounts executive. 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).

By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons who perform the management activities involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. See section 101(a)(44)(A)(iv) of the Act; *see also* 52 Fed. Reg. 5738, 5740 (February 26, 1987)(available at

1987 WL 127799). The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. at 5739.

Here, the record does not demonstrate the actual duties to be performed by the beneficiary such that they could be classified as managerial or executive in nature, nor does it persuasively establish that the beneficiary's subordinate staff at the time of filing could perform the majority of the non-qualifying duties associated with operating the petitioner's business. The petitioner has not submitted evidence on motion to overcome the prior determination of the AAO. Accordingly, the AAO's decision dated February 11, 2004 will be affirmed.

Counsel emphasizes that the beneficiary was previously granted an extension of L-1A classification as evidence of his eligibility in the instant matter. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The prior approval does not preclude Citizenship and Immigration Services (CIS) from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

If the previous nonimmigrant petition was approved based on the same unsupported 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*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act. Based on the lack of evidence of eligibility in the current record, the denial of the petition was clearly warranted.

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 previous decision will be affirmed.

ORDER: The AAO's decision dated February 11, 2004 is affirmed.