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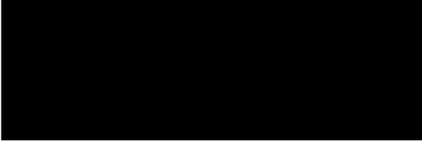
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U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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File: SRC 03 193 50636 Office: TEXAS SERVICE CENTER Date: DEC 04 2007

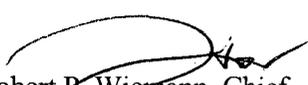
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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)

IN BEHALF OF PETITIONER:  
[Redacted]

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

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its president 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 is a corporation organized under the laws of the State of Florida and is allegedly a "cellular/accessory wholesaler."<sup>1</sup>

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager.

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. § 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.

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<sup>1</sup>According to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on September 15, 2006. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, the company can no longer be considered a legal entity in the United States. See § 607.1405, Fla. Stat. (2006). Therefore, if this appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner's continued eligibility for the benefit sought.

- (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 primary issue in the present matter is whether the beneficiary will be employed by the United States entity 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 petitioner does not clarify in the initial petition whether it is claiming that the beneficiary will be

primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

As the petitioner did not provide detailed job descriptions for the beneficiary or for his current subordinate employees, the director requested additional evidence on August 6, 2003. The director requested, *inter alia*, a more detailed description of the beneficiary's job duties; an organizational chart; and copies of the petitioner's state and federal quarterly tax returns for 2003.

In response, the petitioner submitted a letter dated October 16, 2003 in which the beneficiary's job duties were described as follows:

[The beneficiary] is president of [the petitioner] and is responsible for [the] on going [sic] business operations and their success, including formulation of our corporate objectives, growth of our sales and payroll going forward, and otherwise improving upon the execution of our business objectives. The position requires extensive prior executive or managerial experience as the success of [the] operations rest[s] on his shoulders. [The beneficiary] is [the] chief executive and has the highest level of authority in [the] company and engages in the highest level executive decision making organization wide including [the foreign employer].

[The beneficiary] is responsible for hiring, training, supervision and evaluation of staff, (approx. 30% of time) negotiating contracts, and overseeing sourcing, inventory management, new product evaluation, (approx. 40% of time) review of management reports on market conditions and business opportunities, (approx. 20% of time) and final oversight over purchasing and financial operations (approx. 10% of time).

The petitioner also submitted an organizational chart showing the beneficiary supervising a "general manager," who, in turn, is shown supervising a sales and administrative assistant. The beneficiary is also portrayed as supervising a variety of "outsourced professional services" such as legal, accounting, and information technology. The petitioner described the alleged subordinate employees in the letter dated October 16, 2003 as follows:

[The beneficiary] has direct supervision over [the] General Manager who [is] in charge of directing the company's day to day operations, analyzing, reviewing and briefing [the] president on current retail and wholesale market conditions, competition and emerging opportunities, and engaging in direct supervision of our sales and administrative assistant who [is] in charge of office paperwork, shipping, correspondence and customer relations with regards to on going business activity.

Finally, the petitioner submitted its federal and state wage reports for the third quarter of 2003 (July, August,

and September). The instant petition was filed on July 2, 2003. The third quarter wage reports reveal that the petitioner employed no one in July or August 2003 and paid a total of \$1,250 in wages to three people in September 2003. The petitioner did not submit wage reports for the first or second quarters of 2003. Therefore, the record indicates that the petitioner had no employees for the first eight months of 2003.

On March 19, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager.

Upon review, the petitioner's assertions are not persuasive.

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. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner may not claim that the beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will formulate "corporate objectives;" improve upon the execution of "business objectives," review "management reports," and manage inventory. However, the petitioner does not specifically define the petitioner's corporate or business "objectives;" does not explain who will be producing the "management reports" or discuss their content; and does not explain how, exactly, the beneficiary will oversee the management of inventory without any subordinate employees. It is also not credible that the beneficiary would spend 30% of his time hiring, training, supervising, and evaluating his subordinate staff when the record indicates that the petitioner had no employees at the time the petition was filed. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary will actually perform managerial duties. 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). 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).

Likewise, it appears that the beneficiary will be primarily performing non-qualifying administrative or operational tasks, which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will negotiate contracts and oversee inventory management, new product

evaluation, purchasing, and financial operations. However, such duties constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the organizational chart and job descriptions for the subordinate employees fail to identify any employees or contractors who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to these duties and to the management of the business in general, it must be concluded that he performs these tasks. Not only are these subordinate employees not described as performing these non-qualifying tasks for the beneficiary, the very existence of these employees has not been established given that the wage reports indicate that the petitioner did not employ anyone at the time the petition was filed. As the petitioner has not established how much time the beneficiary will devote to non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart, wage reports, and job descriptions for the subordinate staff members, the beneficiary purports to supervise a staff of two employees and, indirectly, the provision of certain specialized services by contracted service providers. However, the petitioner has not established that the "general manager" is primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that this vaguely described employee is performing the tasks necessary to produce a product or to provide a service. It is simply not credible that a business of this nature would require a subordinate supervisor to supervise an administrative assistant. Inflated job titles and artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support a managerial position. Also, the supervision or management of independent contractors will not permit a beneficiary to be classified as a managerial employee as a matter of law. See section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The Act is quite clear that a managerial employee must manage *employees* in order to be classified as a manager for purposes of this visa classification.

Regardless, as explained above, the petitioner's wage report for the third quarter of 2003 clearly indicates that the petitioner had no employees in July 2003 when the instant petition was filed. The petitioner also failed to submit copies of its wage reports for the first two quarters of 2003 even though these reports were specifically requested by the director in the Request for Evidence. Therefore, it must be presumed that the petitioner had no employees during that timeframe as well. 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The record is also devoid of any evidence regarding the petitioner's purported employment of independent contractors. Once again, 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. Finally, the fact that the petitioner may have resumed employing persons several months after the petition was filed is not relevant to this proceeding. 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).

However, even if the petitioner was proven to have employees, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial 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. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner did not establish the skill level or educational background required to perform the duties of the two claimed subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.<sup>2</sup> Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>3</sup>

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<sup>2</sup>In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

<sup>3</sup>While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line manager of non-professional employees and/or will be engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will be performing the tasks necessary to produce a product or to provide a service and/or will be a first-line supervisor. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.<sup>4</sup>

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).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, it is noted that the instant petition was filed to extend a previously approved petition. The previously approved petition was approved from June 30, 2001 until June 30, 2003. The instant extension petition was filed on July 2, 2003. In that petition, the petitioner clearly indicates that its basis for the classification sought is the "continuation of previously approved employment without change." The petition also seeks to "extend the stay of [the beneficiary] since [he] now hold[s] this status." Title 8 C.F.R. § 214.2(l)(14)(i) clearly states that an extension petition may only be filed if the validity of the original petition has not expired. In this case, since the validity of the previous petition expired on June 30, 2003, the instant extension petition filed on July 2, 2003 must be denied as untimely. Therefore, beyond the decision of the director, the AAO will dismiss the appeal for this additional reason.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with

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<sup>4</sup>Counsel cited the Foreign Affairs Manual (FAM) in the brief as authority. It must be noted that the FAM is not binding upon Citizenship and Immigration Services (CIS). *See Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N 125 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

the foreign employer. The regulation at 8 C.F.R. § 214.2(i)(3)(i) states that a petition filed on Form I-129 shall be accompanied by:

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.

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is, or will be doing business . . . as an employer in the United States." A "subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

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; 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 the 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.

In this matter, the petitioner, a corporation, asserts that it is 51% owned by the foreign employer. In support, the petitioner submitted a stock certificate indicating that 510 out of 1,000 shares of stock were issued to the foreign employer on June 26, 2000. However, this assertion is inconsistent with the petitioner's Forms 1120, U.S. Corporation Income Tax Return, for the years 2000, 2001, and 2002. The petitioner asserted in those tax returns that the beneficiary owns 100% of the petitioner's stock. The petitioner offers no explanation for this fundamental inconsistency in the record regarding the petitioner's ownership and control and, thus, its eligibility for the benefit sought as a qualifying organization has not been established. 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). 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).

Furthermore, as indicated above, the petitioner's wage report for the third quarter of 2003 clearly indicates that the petitioner had no employees in July 2003 when the instant petition was filed. The petitioner also failed to submit copies of its wage reports for the first two quarters of 2003 even though these reports were specifically requested by the director in the Request for Evidence. Therefore, it must be presumed that the petitioner had no employees during that timeframe as well. Once again, 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Therefore, because the petitioner failed to establish that it is or will be doing business as an employer in the United States, the petitioner has failed to establish that it is a qualifying organization as defined by the regulations.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity, and the petition may not be approved for this additional reason.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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.