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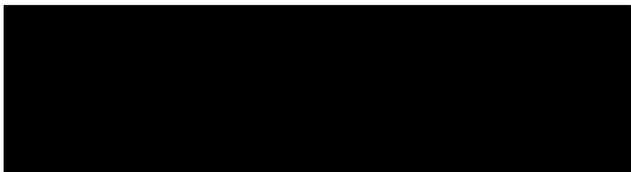
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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File: WAC 04 079 51254 Office: CALIFORNIA SERVICE CENTER Date: JUL 05 2007

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

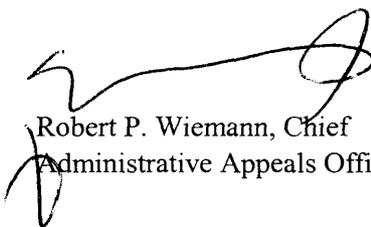
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, California 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 petition seeking to extend the employment of its marketing director 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 sole proprietorship operating in the State of California and is engaged in the sale of fashion jewelry. The petitioner claims that it is the branch office of Michelle's Shellcraft located in Cebu, Philippines. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that there is a qualifying relationship between the U.S. and foreign entities.

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, the petitioner asserts that the director's decision suggests that he failed to review the petitioner's response to the request for evidence, and thus the petition was "unfairly adjudicated." The petitioner submits a brief and documentary evidence in support of the appeal.

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.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

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

The first issue addressed by the director is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity under the extended petition.

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 February 2, 2004. The petitioner indicated on Form I-129 that the beneficiary would continue to serve as marketing director, and stated that the U.S. company has four employees. In a letter dated January 9, 2004, the petitioner described the beneficiary's duties as follows:

20% Research and evaluate lists for identifying prospective market segments for its products; conduct feasibility studies; implement and apply appropriate strategies and programs to increase business volume. Establish and maintain relationships with different companies especially those with which the petitioner conduct [sic] business to ensure the best and most advantageous deals for the Petitioner.

20% Establish formats for gathering data and surveys. Carefully analyze the market's potential and collecting data on customer preferences as well as analyzing and gathering opinions regarding company's line of products. Prepare current marketing and distribution strategies based on analysis and prepare reports to refine and augment the company's present approaches.

15% Identify and concentrate on prospective or untapped market sections or segments for which the company's present and future products will be offered.

15% Develop long term marketing and business strategies on behalf of the company and prepare forecasts and projections for emerging business cycle. Develop and implement a plan whereby problems, complaints, feedbacks and other observations of clients and customers can be coursed through and ultimately addressed and/or solved.

15% Promote communication and cooperation among employees, leading to enhanced motivation and improvement in the work climate as well as interact with management; manage the advertising and public relations process and play a pivotal role in preserving and enhancing our client base.

15% Direct and coordinate the activities of other marketing/sales staff to effectively pursue the company's marketing and sales goals.

The petitioner submitted an organizational chart for the U.S. entity, which indicates that the beneficiary reports to the general manager/owner, and supervises a sales manager, who in turn supervises an in-house sales person. The organizational chart included brief job descriptions for each employee, and indicates that the beneficiary develops marketing plans and programs for each product, directs promotional support, provides marketing information by answering questions and requests; and achieves financial objectives by preparing an annual budget, scheduling expenditures, analyzing variances, and initiating corrective actions.

On March 11, 2004, the director issued a four-page request for evidence, requesting extensive supporting documentation for assertions made in the petition. In part, the director instructed the petitioner to submit a more detailed description of the beneficiary's duties, and a copy of the petitioner's California Form DE-6, Quarterly Wage and Withholding Report, for the last quarter of 2003.

On May 18, 2004, the California Service Center received a one-page letter from the petitioner's bank, confirming the account status for the company's account, and noting the persons authorized to access the account. The response also included a partial copy of the director's request for evidence. The response was mailed directly from the petitioner's bank.

On July 16, 2004, the director denied the petition. The director determined that the petitioner had not established the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the petitioner failed to respond to his specific requests for additional evidence to establish the beneficiary's employment in a managerial or executive capacity. The director determined that it appears the beneficiary would be primarily performing the marketing function, rather than managing marketing activities for the petitioner.

On appeal, the petitioner asserts that it submitted a complete and timely response to the request for evidence on May 14, 2004. The petitioner notes it is evident that from the director's decision that such evidence was either never received or never reviewed. The petitioner submits a brief and 24 exhibits which it claims were previously submitted. The petitioner summarizes the beneficiary's previously submitted job duties, and claims that she is employed in a managerial capacity.

Upon review, 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.*

The petitioner's description of the beneficiary's duties, while lengthy, is too general and nonspecific to establish how the beneficiary allocates her time on a day-to-day basis. For example, the petitioner's statements that the beneficiary will "develop long term marketing and business strategies," "implement and apply appropriate strategies or programs," "prepare current marketing and distribution strategies," "identify and concentrate on prospective or untapped market sections or segments," "promote communication and cooperation among employees," and "play a pivotal role in preserving and enhancing our client base," do little to convey an understanding of the beneficiary's actual duties. 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 her 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).

Furthermore, portions of the job description suggest that the beneficiary is actively involved in performing market research and promotional tasks that are clearly not managerial or executive in nature. The petitioner states that the beneficiary will "research and evaluate lists for identifying prospective market segments," "conduct feasibility studies," "establish formats for gathering data and surveys," "analyze the market's potential and collect data on customer preferences," "analyzing and gathering opinions regarding the company's line of products," "provide marketing information by answering questions and requests," and "manage the advertising and public relations process." The petitioner does not indicate how the lower-level employees would relieve the beneficiary from performing data collection, market research and analysis, advertising or public relations functions, nor does it articulate why these duties, which appear to require a substantial portion of the beneficiary's time, are managerial in nature.

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). Although the petitioner indicated how the beneficiary's time would be allocated among various broad responsibilities, the description as a whole fails to adequately specify the duties to be performed by the beneficiary, such that they could be classified as managerial or executive in nature. Accordingly, while the beneficiary may perform some managerial duties, the evidence submitted is insufficient to establish that her role within the company is primarily managerial. 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)).

The director reviewed the position description and organizational chart submitted with the initial petition and found the evidence insufficient to establish eligibility for the benefit sought. 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). 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). As noted by the director, no additional evidence relevant to the beneficiary's employment capacity was received in response to the director's request.

The petitioner now claims that a voluminous response to the request for evidence was in fact submitted on May 14, 2004. The petitioner has not provided shipping receipts or other records to support this claim. 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)). Regardless, upon review of the evidence submitted on appeal, the petitioner simply re-submitted the same job description and organizational chart that were submitted initially and already found to be deficient by the director.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). Here, the petitioner claims that the beneficiary supervises a sales manager, who in turn supervises a sales person, however, there is no evidence that the beneficiary has authority to hire or fire employees or otherwise recommend personnel actions.

Furthermore, although one of the beneficiary's claimed subordinates has the title "sales manager," his duties include processing sales orders and acknowledgements, sales invoices, receiving products, inventory control, and shipping, duties which are not managerial in nature. The petitioner claims to employ an in-house sales person subordinate to the sales manager, however, the record does not substantiate that this employee was employed as of the date of filing. In the third quarter of 2003, the sales manager and sales person were both paid wages of \$3,510. In the fourth quarter of 2003, the sales manager was paid \$3,510, while the sales person received only \$1,170 in wages, or payment for one month's salary. The petitioner's internally prepared payroll statements also show no payments to the sales person after October 2003. Accordingly, the petitioner has not established that it actually employed the sales person, and the sales manager will not be considered a managerial or supervisory employee for purposes of this analysis. Nor has the petitioner asserted that the sales manager is employed in a professional capacity, or provided evidence that would support such a finding. The petitioner has not established that the beneficiary qualifies as a "personnel manager" as set forth in the regulations.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). 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. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *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 manages an essential function. As discussed above, the petitioner has not sufficiently specified the beneficiary's duties, identified a function managed by the beneficiary, or established the amount of time the beneficiary devotes to managerial duties. Further, the limited information provided suggests that the beneficiary performs all aspects of the marketing function, including non-qualifying duties.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The petitioner is a one-year-old company engaged in the import, wholesale and retail sales of fashion jewelry. It claims to employ a general manager, a marketing director, a sales manager, and a sales person. The evidence in the record indicates that the owner and general manager of the company does not participate in the business on a full-time basis, as she filed her U.S. income tax returns as a non-resident. As discussed above, the record does not contain evidence that the petitioner employed the sales person at the time the petition was filed. Accordingly, the only full-time employees of the company are the beneficiary and the sales manager. Notwithstanding the managerial job titles held by the beneficiary and her subordinate, the record does not establish that the petitioner can reasonably operate an import and wholesale business, as well as a retail store, with two to three managerial employees. The petitioner reasonably requires employees to purchase and import goods, market, sell, package and ship the goods to wholesale customers, manage inventory, set up store displays, handle retail customer transactions, and perform the day-to-day financial and administrative duties associated with operating any business. Based on the evidence presented, the beneficiary and her claimed subordinate would need to participate in these non-qualifying duties in order for the business to remain in operation. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Based on the foregoing discussion, the record is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, the petitioner must establish eligibility at the

time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Accordingly, the appeal will be dismissed.

The remaining issue addressed by the director is whether the petitioner has established that a qualifying relationship exists between the petitioner and the beneficiary's previous overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) 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;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner claims to be a branch office of the foreign entity and states that both entities are sole proprietorships with the same ownership. The director denied the petition noting that the petitioner had not provided probative evidence of the establishment of a branch office in the United States.

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). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick, supra* at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies of IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

The AAO concurs with the director's finding that the petitioner did not establish the claimed branch relationship. The evidence of record demonstrates that the foreign entity and the U.S. entity are both sole proprietorships owned by the same individual. While common ownership and control by a single individual would typically establish an affiliate relationship, the AAO emphasizes that it is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). The petitioner has submitted evidence that the U.S. business is owned by a Filipino national who is identified as a non-resident alien for income tax purposes. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). As in the present

matter, if the petitioner is actually a non-resident alien, with no authorized branch office of the foreign employer or separate legal entity in the United States, there is no U.S. entity to employ the beneficiary and therefore no qualifying organization. For this additional reason, the petition cannot 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed.