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U.S. Citizenship  
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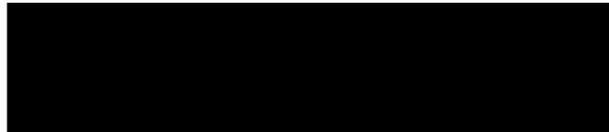


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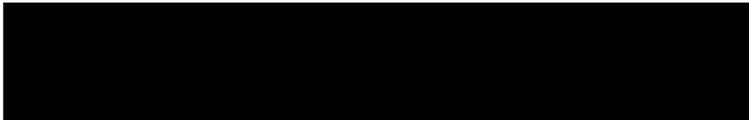
JUN 06 2007

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)

IN 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, 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 visa petition seeking to extend the employment of its president/CEO 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 California and is an importer and distributor of heating systems and other equipment. 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 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. In support of this assertion, the petitioner submits a brief and additional evidence.<sup>1</sup>

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.

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<sup>1</sup>It is noted that counsel to the petitioner requested oral argument in his letter dated November 21, 2005. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. The written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

- (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 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 the beneficiary is claiming to 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, and counsel asserts on appeal that more than half of the beneficiary's duties are executive *and* managerial. A beneficiary may not claim to 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. However, given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary is employed either as a manager *or* an executive, and the AAO will consider both classifications.

The petitioner described the beneficiary's job duties in a letter dated August 16, 2005 appended to the initial petition as follows:

As the president/CEO, [the beneficiary] will, as in the past year, continue on a regular and systematic basis to work in the top-level managerial/executive capacity of the company as president/CEO. He continues to direct the management of the company. He is the chief decision maker regarding goals and policies of the company. As the chief architect of the U.S. operation, it was mostly his ideas that formed the goals and objectives as articulated in the Business Plan for the prior year and for the coming years [See Business Plan].

He reports only to the Board of Directors and shareholders. He presided at the Board of Directors meetings and meeting of the shareholders. Having delegated the supervision of

daily operations of the company to department heads and other professionals, he supervises the work of the following managerial and professional employees:



- Engineer and Manager of the Engineering Department
- Engineer and Supervisor of Sales and Marketing Department
- Regional Sales Manager for N. California and Oregon
- Regional Sales Manager for the states of Washington, Idaho and Montana (Beginning January 2006)
- Supervisor of Warehouse Operations
- Office Administrator and Bookkeeper

[The beneficiary] retains the authority to hire, fire, promote or demote company personnel. He hired and/or approved the hiring of all the employees of the company. He negotiated and signed some of the major contracts, including the multi-million dollar joint venture contract with China's Spring Breeze Boiler Manufacturing Plant to produce and market boilers using new technology in the U.S. He directs expansion. He controls the financial affairs and has the authority to sign corporate checks. He has authority, with the corporate secretary or as authorized by the Board of Directors, to sign stock certificates to transfer shares of the corporation and to sign deeds, mortgages and bond contracts. He exercises wide latitude of discretionary authority on the daily operations of the company.

The petitioner also provided wage reports for its employees indicating that, contrary to the assertions made in the letter dated August 16, 2005, the petitioner actually employs five people including the beneficiary. The wage reports omit both of the "regional sales managers." While the omission of [REDACTED] can be explained as he had not yet commenced working for the petitioner, the petitioner offers no explanation for the omission of [REDACTED] from the wage reports. While it is possible that [REDACTED] is an independent contractor, the record is devoid of any evidence establishing his specific relationship with the petitioner.

On August 29, 2005, the director requested additional evidence. Specifically, the director requested an organizational chart identifying the subordinate employees and their job duties as well as a more detailed description of the beneficiary's duties in the United States.

In response, the petitioner provided an organizational chart showing the beneficiary at the top of the organization managing the four employees identified in both the letter dated August 16, 2005 and the wage reports. The chart also includes an accountant, sales representatives, and the "regional sales managers," even though the record is otherwise devoid of any evidence that these additional people are employed by the petitioner.

The petitioner also provided a letter dated October 14, 2005 providing further details regarding the beneficiary's job duties. As this letter is in the record, the entirety of its contents will not be repeated here. Generally, the letter breaks down the beneficiary's duties into six components and gives brief descriptions for each component. These components are identified as follows:

- Setting Company Policies & Goals (10%)

- Developing New Product Lines (10%)
- Creating Business Alliance & Negotiating & Signing Contracts (30%)
- Directing the Management of the U.S. Company (40%)
- Staffing & Personnel Management (5%)
- Discretionary Authority (5%)

In describing the first three components (a total of 50% of the beneficiary's time), the petitioner primarily describes what the beneficiary accomplished during the previous year. The only example of a specific duty currently being performed involves the negotiating of a contract with a Chinese producer of polyethylene cross-link tubing. The job description does not clearly explain if negotiating this contract will consume 30% of the beneficiary's time going forward or if 30% of the beneficiary's time has historically been consumed by this duty.

As for the fourth component, which consumes 40% of the beneficiary's time, the petitioner describes the beneficiary as supervising the work of the "manager of the engineering department" and the "manager of the sales and marketing department." These two employees, while described as managers, are actually performing services. The "manager of the engineering department" designs heating systems ordered by customers, and the "manager of the sales and marketing department" is involved in marketing the petitioner's products and participates in trade shows and exhibitions. The beneficiary is also described as managing the "regional sales manager," even though this person does not appear to be an employee of the petitioner and is described in the organizational chart as reporting to the "manager of the sales and marketing department."

The petitioner fails to provide any specific duties associated with the final two components.

On October 26, 2005, the director denied the petition. The director concluded that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the record establishes that the beneficiary's duties are primarily those of an executive or manager. Counsel argues that the director incorrectly attributed non-qualifying duties to the beneficiary and ignored evidence in the record.

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

Title 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 Citizenship and Immigration Services (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. In the instant matter, the United States operation has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 beneficiary may not claim to 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. Although the petitioner has provided a lengthy narrative describing what the beneficiary has done during the petitioner’s first year in operation, the job description vaguely describes his proposed job duties. The only duties that are defined with any specificity are the beneficiary’s negotiations with a Chinese producer and the beneficiary’s supervision of his subordinate employees. As the former duty was not described with enough specificity to be considered managerial in nature, and the latter duty is non-qualifying because the subordinate employees are not primarily managerial, supervisory, or professional (*see infra*), the petitioner has not established that the beneficiary will be primarily employed in a managerial capacity. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory or managerial employees. As explained in the organizational chart, wage reports, and job descriptions for the subordinate employees, the beneficiary appears to manage a staff of four employees who are engaged in operating the petitioner’s business. While the petitioner has given the subordinate employees lofty managerial titles, the petitioner has not established that these employees are primarily engaged in performing supervisory or managerial duties. To the contrary, the subordinate employees appear to be engaged in performing tasks related to providing a service or producing a product, i.e., marketing products and services and designing heating systems. 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.

In view of the above, the beneficiary would appear to be primarily a first-line supervisor, the provider of actual services, or a combination of both. 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). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are

professionals. Section 101(a)(44)(A) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Moreover, the petitioner has not established that the beneficiary will manage professional employees. 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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the duties of any of the beneficiary's subordinate employees. While an engineering degree may be helpful to the "manager of the engineering department" and the "manager of the sales and marketing department," the record is devoid of any evidence that such a degree is necessary to perform the duties described for these employees. Moreover, as the other employees and independent contractors do not have university degrees, the petitioner has not established that they are professionals. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>2</sup>

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<sup>2</sup>While the petitioner has not specifically argued that the beneficiary manages 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(1)(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, despite its division into components, 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 supervisor of non-professional employees. 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*

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, the beneficiary appears to be primarily employed as a first-line supervisor. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.<sup>3</sup>

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, a related matter is whether the petitioner established that it and the organization which employed the alien overseas are still qualifying organizations as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates," and are or will be "doing business" as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). 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."

In this matter, the petitioner asserts in the Form I-129 that it is 100% owned by the beneficiary's foreign employer, [REDACTED] thus establishing, if true, a parent/subsidiary qualifying relationship. In support

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*Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

<sup>3</sup>The AAO recognizes that the director's decision does contain some mischaracterizations of the record. For example, the director concludes that the beneficiary's duties are largely comprised of marketing and sales duties and that the beneficiary is in charge of designing heating systems. Upon review, the AAO agrees that the record does not clearly attribute such duties to the beneficiary, and the director's comments are hereby withdrawn. However, as the petitioner failed to establish that the beneficiary will be primarily employed as a manager or executive for the reasons explained above, these misattributions were harmless error.

of this assertion, the petitioner provides a stock certificate, stock ledger, and a letter dated August 16, 2005. However, in response to the director's Request for Evidence, the petitioner provided a copy of its 2004 IRS Form 1120 which contains averments that directly contradict the petitioner's assertion that it is 100% owned by [REDACTED]. In response to queries 4 and 5 in Schedule K to the Form 1120, the petitioner identifies [REDACTED] as the owner of 100% of the petitioner's stock. The petitioner offered no explanation for this serious inconsistency regarding the ownership and control of the petitioner. 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). In view of the above, the petitioner has not established that it has a qualifying relationship with the foreign entity, and for this additional reason the petition may not be approved.

Furthermore, if the previous nonimmigrant "new office" petition was approved based on the same contradictory assertions regarding a qualifying relationship 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 an application or petition 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. at 597. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engr. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6<sup>th</sup> Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ.*, 99 Fed. Appx. 556, 2004 WL 1240482 (5<sup>th</sup> Cir. 2004). 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, 8 U.S.C. § 1361.

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 (9<sup>th</sup> Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2<sup>d</sup> 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

Finally, based on the reason for the denial of the instant petition regarding a qualifying relationship, a review of the prior L-1 nonimmigrant petition approved on behalf of the beneficiary is warranted to determine if it

was approved in error. Therefore, the director shall review the prior L-1 nonimmigrant petition approved on behalf of the beneficiary (WAC 04 234 53282) for possible revocation in accordance with 8 C.F.R. § 214.2(1)(9).

**ORDER:** The appeal is dismissed.

**FURTHER ORDERED:** The director shall review the prior L-1 nonimmigrant petition approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(1)(9).