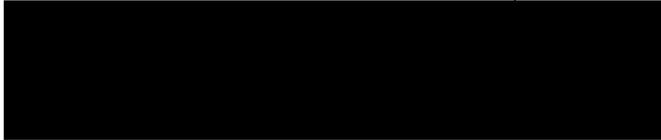


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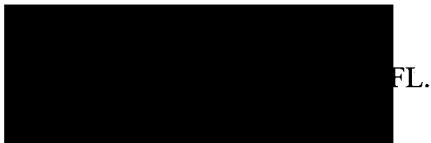
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FILE: SRC 05 225 50357 Office: TEXAS SERVICE CENTER Date: MAR 07 2007

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:



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 appeal will be dismissed.

The petitioner, a Texas corporation, claims that it is engaged in the import and export of construction materials. The petitioner states that it is a subsidiary of [REDACTED] located in China. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner was initially granted a one-year period of stay to open a new office. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of president for a three-year period.

The director denied the petition on April 18, 2006, concluding that the record contains insufficient evidence to demonstrate: (1) that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company; and (2) that the U.S. company is doing business on a continuous and systematic basis. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business.

On appeal, counsel for the petitioner states that during the time period of August 22, 2004 through August 26, 2005, the U.S. entity employed "at least three workers." Counsel explains that two individuals were employed to fill the positions of accounting and office clerk. In addition, counsel states that "other 2005 employees were hired as temporary help in the amount of \$2,959.20." In addition, counsel for the petitioner asserts that the beneficiary's function is to manage the organization. Finally, counsel contends that the petitioner submitted documentation with the original petition to evidence that the U.S. entity has been doing business for the past year. Counsel for the petitioner submits a brief and additional documentation in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on August 12, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of president for the petitioner, which claimed to have two employees. The petitioner indicated on the Form I-129 that the beneficiary's proposed duties in the United States are the following:

Direct to [sic] set up & management of the Houston branch operation, establishing the organization, component or functions. Exercise discretion over the day operation; seek new business and contracts and actively market the company.

In addition, in a letter dated April 15, 2005, submitted by the general manager of the foreign parent company, the beneficiary's proposed duties in the U.S. are described as the following:

- (1) Expanding market, developing business
- (2) Establish structure organization
- (3) Managing other employees
- (4) Making business decisions

The petitioner also submitted the organizational chart of the U.S. entity. The chart indicates the beneficiary as president who supervises "employee 1", "employee 2" and "employee 3". The petitioner also submitted the company's Form 941, Employer's Quarterly Federal Tax Return, for the last three quarters of 2004 and

the first quarter of 2005 which indicated that the U.S. entity did not hire any individuals as of March 2005. The petitioner also submitted copies of its Texas state quarterly wage reports, which showed that the petitioner paid wages to ██████████ during the second quarter of 2004, to "██████████" and the beneficiary during the third quarter of 2004, and no wages during the fourth quarter of 2004 and the first quarter of 2005.

On August 29, 2005, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director noted that the petitioner indicated in the petition that the U.S. entity currently employs two individuals, including the beneficiary. The director requested that the petitioner submit a description of the positions held by each employee, including all duties performed and documentary evidence of the educational credentials held by each individual.

In the response to the director's request, the petitioner submitted a letter dated November 10, 2005 indicating that the U.S. entity employed one assistant manager and one office clerk. The letter stated that the assistant manager is responsible for "investigation of market, interaction with clients, collecting market information and translating." The beneficiary also indicated that the duties performed by the office clerk are "products purchasing, market development, negotiation of import and export goods with clients, participating in business meetings, and purchasing products in China." The beneficiary also indicated that the assistant manager has earned an associate's degree and the office clerk has a high school diploma.

The director denied the petition on April 18, 2006 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that the petitioner did not submit documentation to confirm the employment of the assistant manager and the office clerk at the U.S. entity. The director also stated that according to the documentation submitted, it appears that the beneficiary is the only individual employed by the U.S. company.

The petitioner submitted an appeal on May 22, 2006. On appeal, counsel for the petitioner restates the beneficiary's proposed duties as the president of the U.S. company. In addition, counsel states that from August 2004 until August 2005, the U.S. company employed at least three individuals. Counsel asserts that the two employees filled an accounting position and the second job title is not identified. Counsel further states that the U.S. entity hired "temporary help" in 2005 who was compensated in the amount of \$2959.20. Finally, counsel states that the submitted documentation "demonstrate two basic requirements in the Executive Capacity;" including that the beneficiary "exercises wide latitude in discretionary decision-making by hiring of employees and receives only general supervise or direction from higher level executives, the board of directors, or stockholders of the organization." On appeal, the petitioner submitted the Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2005, which indicated that the U.S. company employed two individuals. In addition, the petitioner submitted the Form W-2 for the individual indicated as the "office clerk" in the director's request for evidence. This individual received wages in the amount of \$3600.00 in 2005. According to the petitioner's 2005 IRS Form 1120, U.S. Corporation Income Tax Return, the petitioner paid a total of \$8,100 in salaries and wages, with the beneficiary receiving \$4,500. All of these wages were paid in the fourth quarter of 2005.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. 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 definitions of executive and managerial capacity have two parts. 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).

The petitioner does not clarify 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. Instead, on appeal, counsel for the petitioner asserts that the beneficiary will hold a position that is primarily managerial in nature, and that the beneficiary's position "demonstrates two basic requirements in the Executive Capacity." 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 chooses to represent 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.

The beneficiary's proposed job description includes vague duties such as the beneficiary will be responsible for "expanding market, developing business"; "establish structure organization"; "managing other employees;" "making business decisions" and "seek new business and contracts and actively market the company." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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. at 604.

According to the petitioner's statement on Form I-129, the U.S. company has two employees. The petitioner submitted an organizational chart of the U.S. entity indicating that the beneficiary supervises three employees who were not identified by name or job title. In response to the director's request for evidence, the beneficiary stated that the U.S. company currently employs the beneficiary as president, one assistant manager and one office clerk. On appeal, counsel for the petitioner states that the U.S. company employed one individual in accounting, one individual who was not provided a title, and one temporary employee from August 22, 2004 through August 26, 2005. The petitioner has described the staffing level of the U.S. company three different ways. 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 addition, the petitioner submitted the U.S. company's Form 941, Employer's Quarterly Federal Tax Report, for the last three quarters of 2004 and the first quarter of 2005 which indicated that the U.S. company did not have any employees. On appeal, the petitioner submitted Form 941 for the last quarter of 2005 which indicated that the U.S. entity employed two individuals. However, the petitioner has not submitted evidence to establish that the beneficiary supervised a subordinate staff at the time the petitioner was filed in August 2005. Going on record without supporting documentary evidence is not sufficient to satisfy the petitioner's 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 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). As discussed above, all wages paid by the petitioner in 2005 were reported during the fourth quarter. Therefore, it is evident that the company did not employ any workers when the petition was filed.

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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Furthermore, 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

The U.S. entity employed one full-time employee, the beneficiary as president. As the beneficiary is the only employee of the U.S. company, it appears that the beneficiary will be performing all of the various operational tasks inherent in operating a business on a daily basis, such as acquiring products, negotiating contracts, preparing budgets and financial statements, researching the market, marketing and sales, budgeting, bookkeeping, and paying bills. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily

managerial or executive role. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as the president and one general manager and one sales associate/cashier. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

In addition, as noted above, the petitioner submitted an organizational chart for the U.S. entity which indicates that the beneficiary supervises three unidentified employees. In response to the director's request for evidence, the petitioner stated that the beneficiary supervises an office clerk and an assistant manager. However, the petitioner did not submit any documentation to confirm that these individuals are currently employed by the U.S. entity. Furthermore, the petitioner submitted Form 1099 for 2005 issued to the individual identified as the office clerk for the amount of \$2600. Therefore, it does not appear that this employee was employed by the U.S. entity in a full-time position, nor is it possible to determine that this individual was employed at the time of filing. Thus, the beneficiary is the only employee of the U.S. entity for the majority of the time. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

Furthermore, the petitioner has not established that the beneficiary will be managing an essential function of the U.S. company. 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 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 neither claimed nor provided evidence that the beneficiary manages an essential function.

As discussed above, the totality of the record supports a conclusion that the beneficiary would be required to perform primarily non-qualifying duties associated with the petitioner's day-to-day functions, as the petitioner has not identified sufficient staff within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive position. Accordingly, the appeal will be dismissed.

The second issue in this proceeding is whether the United States entity has been doing business as defined in the regulations for the year preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

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; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The nonimmigrant petition was filed on August 12, 2005. As evidence that the U.S. entity is doing business, the petitioner submitted the following documentation: (1) bank statements for the U.S. company for April 2005 and May 2005; (2) the U.S. company's IRS Form 1120, U.S. Corporation Income Tax Return, for 2004, indicating gross sales of \$97,004; (3) two order contracts dated February 28, 2005 and March 2, 2005 indicating that the beneficiary purchased products.

On August 29, 2004 the director requested that the petitioner provide documentary evidence of the business conducted by the U.S. entity during the past year, such as bills of sale, sales receipts, sales contract and/or invoices.

In a response dated November 18, 2005, the petitioner submitted the following: copies of the U.S. company's bank statements for May, June, August, September, October and November 2004; copies of sales receipts dated May through August 2004; and a balance record for the U.S. entity for the period May 2004 through December 2005.

The director denied the petition determining that the petitioner had not submitted sufficient evidence to establish that the U.S. entity was doing business, in that it continuously and systematically engaged in the provision of goods and services for the previous year. The director noted the petitioner's failure to document business activities subsequent to August 2004.

On appeal, counsel asserts that the petitioner submitted evidence that the U.S. company has been doing business. In addition the petitioner submitted the following documentation: copies of the U.S. entity's bank statements from January 2005 until December 2005; and IRS Form 1120, U.S. Corporation Income Tax Return, for 2005, indicating gross sales in the amount of \$21,260.

On review, the evidence submitted is insufficient to establish that the U.S. entity has been or is engaged in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization. The petitioner's compliance with inquiries made by the director in the request for additional evidence is marginal, at best. The petitioner was given ample opportunity to produce the required initial evidence and other business records to substantiate its claim of doing business as a viable entity in the United States for the previous year. The bank statement and a balance record prepared by the U.S. company did not adequately demonstrate that the U.S. entity was doing business. The non-existence or unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Furthermore, the Form 1120 gross receipts and sales figure in the amount of \$21,360 for 2005 is not substantiated by any independent documentary evidence in the record. The record as presently constituted is not persuasive in demonstrating that the U.S. entity, at the time of filing the petition, was doing business.

If a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business "for the previous year" through the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.* Based on the foregoing discussion, the petitioner did not submit sufficient documentation to evidence that the U.S. entity was doing business for one year prior to filing the instant petition and thus the appeal will be dismissed.

The petition will be denied 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.