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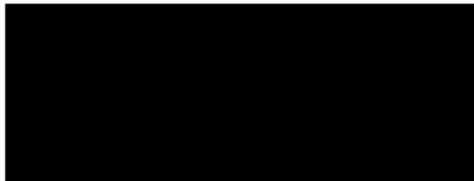
U.S. Department of Homeland Security
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U.S. Citizenship
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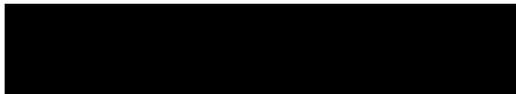
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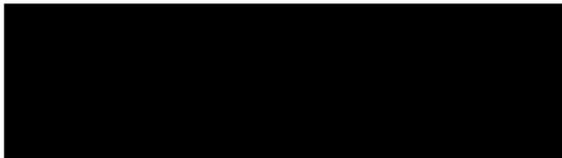
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IN RE: Petitioner:
Beneficiary:



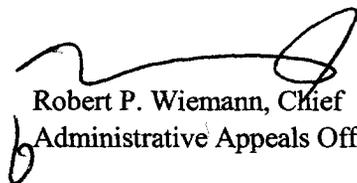
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 petition seeking to employ the beneficiary in the position of general manager to open a new office in the United States 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, allegedly a general partnership consisting of the beneficiary and his spouse, claims to be an architectural design and consulting business.

The director denied the petition concluding that the petitioner failed to establish (1) that the petitioner, within one year of the approval of the petition, will support an executive or managerial position; (2) that the beneficiary has been employed abroad in a primarily managerial or executive capacity; or (3) that the petitioner has a qualifying relationship with the foreign employer. The director concluded that, because it was not established that the foreign entity actually wired the funds to the petitioner, the existence of a qualifying relationship had not been established.

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 asserts that the petitioner sufficiently established that the intended United States operation, within one year, will support an executive or managerial position. Counsel asserts that the beneficiary will manage the organization, and that he will not be providing professional services himself, primarily because he is not licensed to do so. Furthermore, counsel asserts that the beneficiary had been employed abroad in a primarily executive or managerial capacity. Finally, counsel asserts that the director erred in determining that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. Counsel argues that, because both the foreign entity and the petitioner are general partnerships owned by the beneficiary and his spouse, the petitioner was excused from proving that the foreign entity was the source of these funds. Since the owners of both the unincorporated foreign entity and the unincorporated petitioner are the same, the beneficiary may be the source of the start-up funds without affecting ownership or control for purposes of determining whether the petitioner has established the existence of a qualifying relationship.

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 (1)(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.

In addition, the regulation at 8 C.F.R. § 214.2(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue in this matter is whether the petitioner established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

In support of its petition, the petitioner submitted a letter dated September 8, 2004 in which it describes its proposed United States operation as designing, constructing, and developing residential real estate across Southern California. The letter further describes the business and the beneficiary's proposed role as follows:

[The beneficiary] will be in overall control of the business and more specifically at the highest level. He will be the individual responsible for establishing, organizing and promoting the business. He will be responsible for executing all strategic decisions, and setting company policies.

He will further be responsible for hiring and training project managers and supervisors to supervise the workers in the business and control their actions. [The beneficiary] will also be solely responsible for financial management of the upstart business including managing credit lines, short and long term financing, investment expenditures and accumulation of capital. We confirm that [the beneficiary] will not be required to perform any of the day to day operations of the business. Since he will be overseeing the work of licensed professionals, he will spend the majority of his time establishing the business, from advising managers and professionals on direction and seek financial expansion.

He will be responsible for securing funding for the business and the ultimate decision making authority on all contracts negotiated by our business.

The aforementioned managers will report to [the beneficiary] on all their actions pertaining to their duties regarding the policy and strategy. [The beneficiary] will have the sole authority to hire and fire all personnel of the business. He will also institute training programs for staff and have the appropriate manager supervise such instruction. Specifically [the beneficiary], will be hiring and managing the following staff in the first 12 months of operations;

1. Licensed Architect (1)
2. Junior Draftsman (1)
3. General Contractor (1)
4. Surveyor (1)
5. Secretary (1)
6. Project Managers as needed (1)
7. Administrative Staff (1)

The petitioner also submitted copies of two letters dated September 7, 2004 from Wells Fargo. The first letter indicates that the beneficiary opened an account on May 6, 2004 and that his current balance is \$20,154.76. The second letter indicates that the beneficiary's spouse opened an account on May 7, 2004 and that her

current balance is \$9,056.25. The petitioner also submitted a letter dated September 5, 2004 from a money transfer service indicating that the beneficiary received \$13,848.00 from Sri Lanka. However, it is not clear whether this sum was deposited into the beneficiary's personal bank account as discussed in the Wells Fargo letter dated September 7, 2004. The petitioner did not submit any bank account information for the petitioner.

Finally, the petitioner submitted a document dated September 9, 2004 and titled "business plan." This document describes the petitioner's business as follows:

Our main objective is to prepare new residential blueprints, as well as handle the remodeling/improvement planning design of existing properties. While working within the required construction codes and regulations, our goal is to implement the client's specifications into the design so as to meet their request.

We will also provide architectural consultancy on location. This professional service will allow our clients our extended expertise in design situations aside from our blueprints. More specifically we plan on incorporating esthetic values, colors, and finishes to the project.

Once the initial stages of our architectural services are established and implemented, we plan on hiring a Licensed General Contractor who will oversee the construction and remodeling projects according to our blueprints. This will allow [the petitioner] to be somewhat of a one-stop shop for the design and construction of remodeling efforts.

The "business plan" also indicates that the beneficiary is a Sri Lankan architect; that the petitioner plans to market the services described; and that the petitioner projects that the majority of its income for the next three years will be earned by designing "house plans."

On October 12, 2004, the director requested additional evidence. The director requested, *inter alia*, a copy of the petitioner's feasibility study. In response, the petitioner submitted a document which addresses the housing market in California generally but does not specifically address the petitioner's proposed expansion plans.

On November 29, 2004, the director denied the petition. The director determined, *inter alia*, that the petitioner failed to establish that the United States operation, within one year of the approval of the petition, will support an executive or managerial position. Specifically, the director determined that the beneficiary will be primarily providing architectural services and that his managerial or executive duties will be ancillary to providing architectural design and consulting services.

On appeal, counsel asserts that the director erred and that the beneficiary will be performing primarily executive or managerial duties within one year. Counsel further argues that, because the beneficiary is unlicensed to practice architecture in California, he may serve only in a managerial or executive capacity.

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

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

In this matter, the petitioner has failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as required by 8 C.F.R. § 214.2(l)(3)(v)(C). First, the petitioner did not specifically and credibly define the scope of the proposed United States entity, its organizational structure, or its financial goals. As explained above, the petitioner proposes to establish an architectural business even though the beneficiary, who is allegedly both a partner and the principal employee, is not licensed to practice architecture in the State of California. As discussed in greater detail below, this alone calls into question the viability of the petition. Moreover, the petitioner has submitted a vague business plan, which fails to provide any details regarding the proposed United States operation. The petitioner claims that, in the first twelve months of operation, it will hire seven employees

including a licensed architect, a general contractor, and a surveyor, and that it will commence providing architectural services to customers. However, the petitioner's business plan does not include any market analysis or marketing plans, other than the expression of a vague desire to target the Sri Lankan expatriate community in Tarzana, California. The plan does not include any data regarding the size of this population, or the financial ability of the Sri Lankan target audience to patronize the business, nor does it analyze the petitioner's potential competitors or pricing structure. Consequently, the petitioner offers no bases for its cost and income projections.

Second, as indicated above, the petitioner's suggestion that it can establish and grow an architectural services business seems doubtful under California law without altering the petitioner's ownership and control. In this matter, the petitioner is a general partnership owned by the beneficiary and his spouse. Neither owner is an architect licensed by the State of California. While unlicensed persons may form partnerships with licensed architects for the purpose of providing architectural services, and corporations may employ licensed architects also for these purposes, California law does not appear to permit a partnership or sole proprietorship made up of unlicensed individual(s) to render architectural services through employed licensed architects. See Cal. Bus. Prof. Code Ann. §§ 5535-5535.2 (2007). It appears that the only way the petitioner could provide these services would be to enter into a partnership with a licensed architect and to include this architect's name in the operation's title. See Cal. Code Regs. tit. 16, § 134 (2007). As the petitioner's business plan fails to address these serious regulatory challenges or the effect these will have on its ownership structure and marketing plans, the petitioner has not credibly described a business operation which is likely to succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Third, the record indicates that approximately \$30,000.00 has been invested in the United States operation. While the origin and control of these funds will be addressed in the context of analyzing whether the petitioner has established that it has a qualifying relationship with a foreign employer (*see infra*), the size of this purported investment appears entirely insufficient to establish and grow the proposed United States operation given the petitioner's description of its proposed business. As discussed above, the petitioner intends on establishing an architectural services business, which, in the first twelve months, will hire seven employees including a licensed architect, a general contractor, and a surveyor. The petitioner predicts \$258,600.00 in costs in the first year. It is simply not credible that a \$30,000.00 investment, absent a clear plan to begin generating revenue, will permit the United States operation to market its services, hire the required personnel, and set up the business so that, after one year, there will be a need for a managerial or executive employee. Moreover, as these funds are not even owned by the petitioner but by the beneficiary and his spouse individually, these funds may not be considered to be a bona fide investment in the United States operation.

Overall, the lack of a credible business plan and a sufficient investment indicates that it is more likely than not that the beneficiary will not be primarily employed in a managerial or executive capacity after one year. To the contrary, it appears that the beneficiary will likely be primarily performing the tasks necessary to produce a product or to provide a service. 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 Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Fourth, given the petitioner's description of its business organization and the beneficiary's proposed relationship to this business, it appears more likely than not that the beneficiary will not be an "employee" of the United States operation after the first year in operation. As explained in 8 C.F.R. § 214.2(l)(3)(v)(C), the petitioner must establish that, within one year of the petition's approval, the beneficiary will be primarily "employed" as an executive or manager. It is noted that "employer," "employee," and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing the L-1 classification. Section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L), requires beneficiaries to have been "employed" abroad and to render services to the same "employer" in the United States. Further, section 101(a)(44), 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. Finally, the specific definition of "managerial capacity" in section 101(a)(44)(A), 8 U.S.C. § 1101(a)(44)(A), refers repeatedly to the supervision and control of other "employees." Neither the legacy Immigration and Naturalization Service nor Citizenship and Immigration Services (CIS) has defined the terms "employee," "employer," or "employed" by regulation for purposes of the L-1 classification. See, e.g., 8 C.F.R. § 204.5 and 8 C.F.R. § 214.2(l). Therefore, for purposes of the L-1 classification, these terms are undefined.

The Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503

U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).¹

While the legacy Immigration and Naturalization Service (INS) has in the past considered the issue of employment in the context of L-1A intracompany transferee petitions, these decisions, which both predate the Supreme Court's *Darden* decision by over a decade, can be distinguished from the present matter. The decisions in *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980) (hereinafter *Aphrodite*) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm. 1979) (hereinafter *Allan Gee*), both primarily addressed the ability of corporate entities to file petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. The soundness of this particular conclusion is not being questioned and is not at issue in the present matter. However, these decisions fail to directly address how, or whether, petitioners must establish that beneficiaries are bona fide "employees" of the petitioners. The decisions also fail to address how, or whether, petitioners must establish that they are bona fide "employers" of employees.

In the 1980 *Aphrodite* decision, the INS Commissioner addressed whether a petitioner may seek to classify a beneficiary as an intracompany transferee even though the beneficiary was a part owner of the foreign entity and, apparently, not an "employee" of either the foreign entity or the petitioner. The district director and regional commissioner determined that the beneficiary could not be classified as an intracompany transferee because "he is 'an entrepreneur, a speculative investor, and not an employee of an international company.'" 17 I&N Dec. at 530. Relying on *Matter of M--*, 8 I&N Dec. 24 (BIA 1958), the Commissioner disagreed, declined to require that intracompany transferees be "employees," and specifically noted that the word "employee" is not used in section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). 17 I&N Dec. at 531. The

¹ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in the case of the above-cited sections of the Immigration and Nationality Act, there is no indication that Congress intended for the undefined terms "employer" or "employed" to have a broader application than that of the corresponding undefined term "employee." Therefore, in the absence of an intent by Congress to impose broader definitions, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* statutory construction test, apply to the terms "employee," "employer," and "employed" as used in 8 C.F.R. § 214.2(l), 8 U.S.C. § 1101(a)(15)(L), 8 U.S.C. § 1101(a)(44); and 8 U.S.C. § 1153(b)(1)(C). That being said, there are instances in the Act where Congress may have intended a more defined application of the term "employer" than what is encompassed in the conventional master-servant relationship. See, e.g., section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

Commissioner further reasoned that adopting the word "employee" would exclude "some of the very people that the statute intends to benefit: executives" and noted that the *Webster's New Collegiate Dictionary* did not define "employee" to include "executives."

However, the *Aphrodite* decision, while otherwise sound, predates both the 1990 codification of the definitions of "managerial capacity" and "executive capacity" in 8 U.S.C. § 1101(a)(44), Pub. L. No. 101-649, § 123, 104 Stat. 4978, § 123 (1990), and the Supreme Court's decision in *Darden*. As the definitions of both "managerial capacity" and "executive capacity" now clearly use the word "employee" in describing intracompany transferee managers and executives, the commissioner's decision in *Aphrodite* declining to impose an employment requirement upon intracompany transferees, while correct at the time, ceased being a valid approach to determining an alien's eligibility for L-1 classification in 1990.² Furthermore, given that Congress did not define the term "employee" in codifying the definitions of "managerial capacity" and "executive capacity," the Supreme Court instructs that one should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322-323. Therefore, while the *Aphrodite* decision remains instructive as to whether a petitioner may seek L-1 classification for a beneficiary having a substantial ownership interest in the organization, the determination that an intracompany transferee employed in an executive capacity need not be an "employee" has been superceded by statute. Finally, the AAO notes that the Commissioner's reliance on the dictionary definition of the term "employee" is neither binding nor persuasive when compared to the common law treatment of the complex subject.

Moreover, in the 1979 *Allan Gee* decision, the acting regional commissioner of INS determined that the petitioning corporation could seek L-1 classification for the beneficiary even though the beneficiary was the sole stockholder of the petitioner. 17 I&N Dec. at 298. Relying on the basic legal tenet that corporations are separate and distinct from their stockholders, INS correctly concluded that the Act does not prohibit a petitioning corporation from employing, and petitioning for, a beneficiary who happens to own all of a petitioner's stock. 17 I&N Dec. at 297-298. Importantly, however, the decision does not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of the petitioners. It is unclear why the acting regional commission did not take this crucial next step in the analysis. While it is correct that a petitioner may employ and seek L-1 classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that such beneficiaries are bona fide employees. The *Allan Gee* decision simply fails to address the issue being addressed in the instant matter.

² INS adopted regulations substantially similar to the definitions of "managerial capacity" and "executive capacity" ultimately codified in 1990 at 8 U.S.C. § 1101(a)(44). See 8 C.F.R. §§ 214.2(l)(1)(ii)(B)-(C); 52 F.R. 5738-01 (Feb. 26, 1987). These regulations, which also require that L-1 managers and executives be employees, were generally upheld as consistent with the Act even prior to the 1990 codification of these definitions. See *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 (5th Cir. 1989). Therefore, an employment requirement was arguably imposed upon managers and executives seeking L-1 classification as early as 1987.

Regardless, as with the *Aphrodite* decision, the *Allan Gee* decision was decided approximately 13 years before the Supreme Court's decision in *Darden*. As explained above, the *Darden* decision indicates that where Congress fails to define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322-323. As indicated above, the Act fails to define the terms "employee," "employer," and "employed" for L-1 classification purposes. Therefore, while a petitioner, which is solely or primarily owned by a beneficiary, may file a petition for that beneficiary as an L-1A intracompany transferee, the question of whether such a beneficiary will truly be an "employee" as now required by the Act is a separate and independent matter which will be scrutinized on a case-by-case basis utilizing the analysis set forth by the Supreme Court in *Darden*, 503 U.S. at 323-324, and *Clackamas*, 538 U.S. at 449-450.

In other words, while a petitioner may file a petition for a beneficiary who is its sole or primary owner, this does not necessarily mean that the beneficiary will be a bona fide "employee." See *Clackamas*, 538 U.S. 440. In fact, courts employing this analysis in considering whether an owner of an "employer" is also an "employee" have concluded, in certain contexts, that the owner is not an "employee." See, e.g., *Ziegler v. Anesthesia Associates of Lancaster, Ltd.*, 74 Fed. Appx. 197, 2003 WL 22048003 (3rd Cir. 2003) (unpublished); *Solon v. Kaplan*, 398 F.3d 629 (7th Cir. 2005). Using similar analysis, CIS could reasonably conclude that beneficiaries who own and control a petitioning corporation or partnership, as in the cases of *Allan Gee Inc.* and *Aphrodite Investments Limited*, might not, given the facts of individual cases, be "employees" of those petitioners.

Therefore, in considering whether or not one is an "employee" or an "employer," CIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; see also *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Within the context of L-1 nonimmigrant petitions, when a worker is also a partner, officer, member of a board of directors, or a major shareholder, the worker may only be defined as an "employee" if he or she is subject

to the organization's "control." See *Clackamas*, 538 U.S. at 449-450; see also *New Compliance Manual* at § 2-III(A)(1)(d). Factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450 (citing *New Compliance Manual*).

Again, it is important to note that this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Id.* at 450 (citing *Darden*, 503 U.S. at 324). Moreover, in applying the above test, the mere fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; cf. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) (stating that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that the beneficiary will be an "employee" employed in a managerial or executive capacity within its first year in business. As explained above, the petitioner purports to be a general partnership consisting of the beneficiary and his spouse. The petitioner claims that the beneficiary will manage the organization as its principal employee and owner. The beneficiary's spouse, the other partner in the claimed general partnership, is described as a subordinate employee (a secretary) in the proposed organizational chart. The petitioner did not submit a partnership agreement, employment contract, or any other document describing the beneficiary's claimed employment relationship with the petitioner. In view of the above, it appears that the beneficiary will be a proprietor of this business and will not be an "employee" as defined above. It has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be

terminated. To the contrary, the beneficiary *is* the petitioner for all practical purposes. He will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his work; and he will share in all profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that the beneficiary will be "employed" as an "employee" within one year, and the petition may not be approved for that reason.

Accordingly, the petitioner failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

The second issue in the present matter is whether the petitioner has established that the beneficiary has been employed abroad in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

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 have been 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. On appeal, counsel asserts that the beneficiary has been employed either as a manager or an executive. Therefore, the AAO will consider both classifications.

The petitioner described the beneficiary's job duties in its response to the director's Request for Evidence as follows:

PRE-CONTRACT PERIOD: 50% of position responsibility.

- * Supervise initial team meeting about the tentative project and stimulate group brainstorming sessions chaired by the Operations Coordinator with design staff.
- * Review budget estimates and quantity surveys as prepared by the quantity surveyor.
- * Issue final approval of permit drawings, design developments and detail drawings with regards to details of foundation, roof, interior, electrical, drainage etc.
- * Issue final decision regarding design brief as prepared by the senior draftsman prior to submission to the client.
- * Review and suggest necessary changes on tentative contracts as prepared by Operations Coordinator.
- * Sign and approve all contracts on behalf of business.
- * Evaluation of tender documents, select contractor.

POST CONTRACT PERIOD: 30% of position responsibility

- * Final site inspection
- * Review and approve work scheduling, cost planning and deadlines.
- * Review the tentative workforce plan and material scheduling as prepared by the Operations Coordinator, Site Supervisors and the Quantity Surveyor.
- * Supervise when necessary site progress meetings.
- * Provide overall project management as executive for [the petitioner].

ADDITIONAL EXECUTIVE RESPONSIBILITIES: 20% of position responsibility

- * Review Marketing reports and raw research as prepared by Operations Coordinator. Utilize this research for the efficient marketing of company services; example advertise in the same trade publications and in the same newspapers as our direct competition.
- * Attend various Achitectural Industry meetings in Sri Lanka and the Maldive Islands.
- * Meet with the accountant on a monthly basis to review company's financial position and to develop strategies which should expand company's assets.

The petitioner also submitted an organizational chart for the foreign entity. The chart shows the beneficiary at the top of the foreign organization supervising seven employees including a surveyor, an operations coordinator, two site supervisors, and four draftsmen. The petitioner also provided brief job descriptions for the subordinate employees which indicate that they were primarily engaged in performing the tasks necessary to provide the foreign entity's services.

On November 29, 2004, the director denied the petition. The director concluded, *inter alia*, that the petitioner failed to establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity. The director concluded that the record establishes that the beneficiary was primarily engaged in providing architectural services.

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

Upon review, the petitioner's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary acted in a "managerial" capacity. In support of its petition, the petitioner has described the beneficiary as a provider of professional architectural services. However, tasks associated with the provision of a professional service are not qualifying managerial duties. In this matter, the beneficiary was the sole architect on staff and, with the assistance of his subordinate workers, allegedly provided professional services to his clients. While the beneficiary may have also "managed" his business as the sole managerial employee, it appears that these managerial duties were ancillary to his provision of professional services. As the only architect affiliated with the practice, the petitioner has not established that the beneficiary was relieved of the need to perform non-qualifying professional services by subordinate architects. 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; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As explained in the organizational chart and job descriptions for the subordinate staff members, the beneficiary appears to have supervised a staff of seven workers. However, the petitioner has not established that any of these workers was primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that these employees were performing the tasks necessary to produce a product or to provide a service, i.e., drafting and surveying. While some of the workers, such as the senior draftsmen, are described as having a supervisory function, the petitioner has not established that these workers were primarily supervisory workers. In view of the above, the beneficiary would appear to have been primarily a first-line

supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, the petitioner has not established that the beneficiary managed professional employees.³ Therefore, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.⁴

Similarly, the petitioner has failed to establish that the beneficiary acted 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

³In evaluating whether a 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). In this matter, the petitioner has not established that any of the subordinate workers has the equivalent of a baccalaureate degree or that such a degree is necessary to perform the functions of any of the subordinate workers.

⁴While the petitioner has not argued that the beneficiary managed an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function. As explained above, the record establishes that the beneficiary was primarily a first-line manager of non-professional employees and/or was engaged in performing non-qualifying professional tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties were managerial, nor can it deduce whether the beneficiary was primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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 acted primarily in an executive capacity. The job description provided for the beneficiary indicates that he was primarily engaged in providing professional architectural services. Moreover, as explained above, the beneficiary appears to have been primarily employed as a first-line supervisor in conjunction with his provision of these professional services. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

It is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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

The third issue in the present matter is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

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

Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." An "affiliate" is defined in pertinent part as "[o]ne 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." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). In this matter, the petitioner asserts that both it and the foreign employer are general partnerships owned and controlled by the beneficiary and his spouse thus establishing, if true, that the two businesses are affiliates.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of*

Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. As ownership is a critical element of this visa classification, the means by which ownership interests were acquired by the purported owners is relevant. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for an ownership interest.

In this matter, the petitioner submitted copies of two letters dated September 7, 2004 from Wells Fargo. The first letter indicates that the beneficiary opened an account on May 6, 2004 and that his current balance is \$20,154.76. The second letter indicates that the beneficiary's spouse opened an account on May 7, 2004 and that her current balance is \$9,056.25. The petitioner also submitted a letter dated September 5, 2004 from a money transfer service indicating that the beneficiary received \$13,848.00 from Sri Lanka. However, it is not clear whether this sum was deposited into the beneficiary's personal bank account as discussed in the Wells Fargo letter dated September 7, 2004. It is also not clear whom or what was the source of this wire transfer. The petitioner did not submit any bank account information for the petitioner.

On November 29, 2004, the director denied the petition. The director determined that the petitioner failed to establish that the foreign entity owns and controls the petitioner.

On appeal, counsel argues that, because both the foreign entity and the petitioner are general partnerships owned by the beneficiary and his spouse, the petitioner was excused from proving that the foreign entity was the source of these funds. Since the owners of both the unincorporated foreign entity and the unincorporated petitioner are the same, the beneficiary may be the source of the start-up funds without affecting ownership or control for purposes of determining whether the petitioner has established the existence of a qualifying relationship.

Upon review, counsel's assertions are not persuasive.

As indicated above, ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. Moreover, the means by which the purported owners obtained their ownership interests is relevant to the analysis. In this matter, the petitioner failed to establish the ultimate source of the funds supposedly being used to establish the new office. While counsel is correct in observing that the beneficiary and his spouse may be the source of these funds as the sole owners of both the foreign and domestic general partnerships, the record does not establish that the beneficiary and his spouse were the source of these funds or that these funds have been contributed to the general partnership. The petitioner has only disclosed that the beneficiary and his spouse maintain personal banks accounts and that a sum of money was wired to the beneficiary from Sri Lanka. The record does not establish that the beneficiary or his spouse was the source of these wired funds or that their personal bank accounts will be used to acquire partnership interests. 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)).

Furthermore, given the organization and nature of the foreign business, it is not likely that the foreign employer will continue to do business. As explained above, the foreign business appears to be an architectural firm primarily owned and operated by the beneficiary as the sole architect on staff. Without the presence of the beneficiary, it is not credible that the foreign business will continue to be engaged in the regular, systematic, and continuous provision of goods and/or services under the leadership of the senior draftsman.

Accordingly, the petitioner has not established that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary has been "employed" abroad as an "employee" as required by 8 C.F.R. § 214.2(l)(3)(iii). As explained above, the foreign employer is a general partnership owned and operated by the beneficiary and his spouse. According to the organizational chart, the beneficiary was the "managing director" of the business and his spouse was subordinate to him. Similar to the proposed United States operation, it appears that the beneficiary was a proprietor of this business and was not an "employee" as defined by common-law. It has not been established that the beneficiary was "controlled" by the foreign partnership or that the beneficiary's employment could have been terminated. To the contrary, the beneficiary was the foreign employer for all practical purposes. He controlled the organization; set the rules governing his work; and shared in all profits and losses. Therefore, based on the definitions above, the petitioner has not established that the beneficiary was "employed" as an "employee" abroad, and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

As indicated above, the petitioner is claimed to be a general partnership owned and controlled by the beneficiary and his spouse. As an owner of the petitioner, the petitioner would be obligated to establish that the beneficiary's services will be used for a temporary period and that he will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily. 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)). Furthermore, the director specifically requested evidence of the temporariness of the assignment. Counsel, however, chose not to provide this information. 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).

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, the petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

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

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.