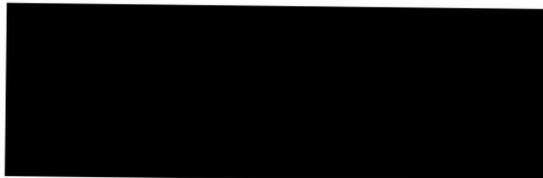


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File: EAC 06 264 50697 Office: VERMONT SERVICE CENTER Date: **FEB 04 2008**

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, Vermont 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 manager 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, a corporation organized under the laws of the State of New York, is allegedly an importer and exporter of merchandise.

The director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position within one year.

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 is not a "new office" and that the beneficiary will perform primarily managerial duties.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

In addition, the regulation at 8 C.F.R. § 214.2(l)(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 (I)(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.

A threshold issue in this matter is whether the petitioner is a "new office" as defined by the regulations and, consequently, whether the director should have applied the more lenient "new office" criteria found in 8 C.F.R. § 214.2(l)(3)(v) to the instant petition.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a "new office" as:

[A]n organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

Moreover, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

[T]he 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.

In this matter, the petitioner indicates in the Form I-129 that the beneficiary is *not* coming to the United States to open a "new office." While the petition is not persuasive in establishing that the petitioner is *currently* "doing business" (*see infra*), counsel to the petitioner on appeal insists nevertheless that the petitioning

organization has done business for more than one year in the United States. In support of this assertion, counsel submits a Form I-797 approval notice for an L-1A petition approved for the petitioning organization having validity dates from December 16, 1997 until October 30, 2000.

On January 9, 2007, the director denied the petition after apparently concluding that the petitioner met the definition of a "new office" in 8 C.F.R. § 214.2(l)(1)(ii)(F). The director applied the "new office" criteria at 8 C.F.R. § 214.2(l)(3)(v) and determined that the petitioner failed to establish that the beneficiary will primarily perform managerial or executive duties within one year of petition approval.

Upon review, the AAO concludes that Citizenship and Immigration Services (CIS) should not have applied the more lenient "new office" criteria to the instant petition. First, the petitioner does *not* claim that the beneficiary will be coming to the United States to open or be employed at a new office. Second, the record as a whole sufficiently establishes that the petitioning organization has done business in the United States in the past for one or more years. Therefore, as the AAO agrees with counsel on this narrow issue, the director's application of the more lenient "new office" criteria in 8 C.F.R. § 214.2(l)(3)(v) was in error, and, to the extent the petitioner was treated as a "new office," the decision is hereby withdrawn. The director should not have excused the petitioner from establishing that the beneficiary will primarily perform qualifying duties immediately upon petition approval. That being said and as discussed *infra*, the director correctly determined, even applying the more lenient "new office" criteria, which permit both the beneficiary to perform primarily non-qualifying duties for the first year in operation and the consideration of future hiring plans, that the petitioner failed to establish that the beneficiary will primarily perform qualifying duties.

In view of the above, the AAO will apply the more stringent criteria in 8 C.F.R. § 214.2(l) applicable to established entities, and the primary issue in this matter is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity immediately upon his arrival in the United States or change of status to the L-1A nonimmigrant classification.

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 foreign entity describes the beneficiary's duties in a letter dated July 13, 2006 as follows:

[The beneficiary] is currently employed in [the] NEW YORK company [the petitioner] responsible for inspecting merchandise we purchase and following up with paper work related to shipping it overseas, since February 2006.

The petitioner did not indicate whether the beneficiary is supervising, or will supervise, any subordinate workers.¹

On October 5, 2006, the director requested additional evidence. The director requested, *inter alia*, an organizational chart for the petitioner and job descriptions for the beneficiary's subordinate employees.

In response, the petitioner submitted a letter dated November 15, 2006 further describing the beneficiary's proposed job duties as follows:

Internet research for new and promotional Denim suppliers in the TriState area.
Contact suppliers via phone for further information and set up appointments for merchandise evaluation.
Generating financial reports and negotiating prices with vendors.

¹It is noted for the record that the instant petition also seeks a change of status from B-1 business visitor to L-1 intracompany transferee. It is further noted that the record establishes neither that the beneficiary was currently in status when the instant petition was filed nor that the beneficiary has ever held a status in the United States that authorizes employment.

Evaluate [the petitioner's] needs and recommend products and services based on customer requirements.

Contact main office oversees [sic] to check shipping status and discuss proposals.

Contact and visit bank to wire or withdraw currency for purchase.

Responsible for public relations by attending trade shows events.

Direct contact with transit personal to coordinate with the exports and customs requirements processes to support the movement of company products and customer shipments in order to maximize efficiency and reduce cost.

Although counsel indicates in her cover letter dated December 28, 2006 that she enclosed an organizational chart for the petitioner, counsel's submission in response to the Request for Evidence included neither an organizational chart nor descriptions of the beneficiary's subordinate workers.

On appeal, counsel submits an organizational chart and description of the petitioner's claimed subordinate workers dated February 2, 2007. The director denied the instant petition on January 9, 2007.

As a threshold issue, the petitioner's attempt to supplement the record on appeal with an organizational chart and job descriptions was inappropriate and will not be considered by the AAO. The director specifically requested this evidence in the Request for Evidence, and the petitioner chose not to provide it. Therefore, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As such, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In view of the above, the petitioner has not established that the beneficiary will primarily perform managerial or executive duties immediately upon petition approval.

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 will act in a "managerial" or "executive" capacity. To the contrary, this description indicates that the beneficiary will be primarily performing non-qualifying administrative or operational tasks which will not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will perform research, contact suppliers, negotiate prices, recommend products, perform banking tasks, attend trade shows, and coordinate shipping. However, performing the day-to-day tasks necessary to the function of the business is not the performance of qualifying duties. Furthermore, as the record fails to identify any employees who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to these duties, it must be concluded that he will perform these tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the

enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). It must be noted that future hiring plans may not be used to qualify a beneficiary as an intracompany transferee primarily performing managerial or executive duties immediately upon his arrival in the United States or change of status to the L-1A nonimmigrant classification. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. First, the record is devoid of evidence establishing that the beneficiary will supervise any subordinate workers. The petitioner failed to provide any evidence addressing the organization and staffing of the United States operation even though this evidence was requested by the director. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Second, the petitioner has not established that the beneficiary will manage an essential function of the organization. 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 will manage 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 will manage the function rather than perform the tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The beneficiary's job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record indicates that the beneficiary will primarily perform the non-qualifying operational or administrative tasks related to the "function." 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 will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization.

Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary indicates that the beneficiary will be primarily performing tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.²

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary was employed abroad in a position that was managerial, executive, or involved specialized knowledge. 8 C.F.R. § 214.2(l)(3)(iv).

The petitioner described the beneficiary's job duties abroad only in the Form I-129 as "[i]nspecting merchandise with paper work related to shipping overseas." However, the record is devoid of evidence establishing that the beneficiary was employed abroad in a position that was managerial, executive, or involved specialized knowledge. The petitioner did not establish that the beneficiary managed subordinate managers, supervisors, or professionals, or managed an essential function of the organization. The record

²The AAO further notes for the record that, even if the more lenient "new office" criteria found in 8 C.F.R. § 214.2(l)(3)(v) were applied to the instant petition, the petition should also be denied. The petitioner has not only failed to establish that the beneficiary will perform qualifying duties upon his arrival in the United States or change of status to the L-1A nonimmigrant classification, the petitioner has also failed to establish, as noted by the director, that the beneficiary will likely perform qualifying duties within one year of petition approval. The petitioner failed to describe the beneficiary's duties after the first year in operation (assuming they are different from the list of non-qualifying duties in the record). Furthermore, the petitioner has failed to establish that a subordinate staff will be hired to relieve him of the need to primarily perform these non-qualifying duties. Therefore, one year after petition approval, it is more likely than not that the beneficiary will be primarily performing non-qualifying tasks.

does not contain any information regarding the staffing of the foreign employer. Also, the petitioner did not provide a detailed job description which establishes that the beneficiary performed qualifying duties even though such evidence was specifically requested by the director in the Request for Evidence. Once again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Finally, while the beneficiary's job description in the Form I-129 is both short and vague, it nevertheless indicates that it is more likely than not that the beneficiary primarily performed non-qualifying operational or administrative tasks abroad. Inspecting merchandise and completing import/export paperwork are both non-qualifying tasks. 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.

Finally, it is noted that the petitioner's assertion that the beneficiary was performing qualifying duties abroad for one year in the past three years is not credible. The record indicates that the beneficiary was born on January 6, 1988. The instant petition was filed on September 26, 2006 and indicates that the beneficiary last arrived in the United States on September 27, 2005 when the beneficiary was 17 years old. Based on the evidence presented, it is simply not credible that, prior to his arrival in the United States, the beneficiary was employed abroad as an executive or manager for one year. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, the petitioner has failed to establish that the beneficiary performed qualifying duties abroad, and the petition may not be approved for this additional reason.

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

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). An "affiliate" is defined in part as "[o]ne of two legal entities owned and controlled by the same group of individuals." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). The petitioner must also establish that both it and the foreign entity are or will be "doing business." 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

In this matter, the petitioner does not clearly assert the nature of its purported qualifying relationship with the foreign employer. However, the petitioner submitted two stock certificates indicating that it is equally owned by the beneficiary and [REDACTED]. The petitioner also submitted translations of Moroccan organizational documents indicating that the foreign entity is owned by three partners – [REDACTED] and [REDACTED]. In view of the above, it does not appear that the petitioner and

the foreign employer are qualifying organizations because they do not share ownership and control. Furthermore, as the stock certificates submitted for the record do not indicate how many shares have been issued to each of the stockholders, they do not appear to be complete, valid stock certificates under New York law. Therefore, they are not probative of the petitioner's ownership and control. *See generally* N.Y. Uniform Commercial Code Part 2 (McKinney 2007). Finally, the petitioner did not submit a copy of its stock ledger even though this evidence was specifically requested by the director. Once again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As the petitioner's failure to submit a copy of its stock ledger precluded a material line of inquiry into the petitioner's ownership and control, the petition may not be approved for this reason alone.

Moreover, the record is devoid of evidence establishing that the petitioner and the foreign employer are "doing business." Organizational documents do not establish that an entity is or will be engaged in the regular, systematic, and continuous provision of goods and/or services. While the record contains evidence that the petitioner *had been* engaged in doing business in the past, thus disqualifying it from the application of the more lenient "new office" criteria (*see supra*), the record is not persuasive in establishing that the petitioner is actively engaged in doing business as defined by the regulations.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, 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).

In this matter, the petitioner claims to be 50% owned and controlled by the beneficiary. As a purported owner of the company, the petitioner is 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. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

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 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.