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U.S. Citizenship
and Immigration
Services

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MAY 0 4 2005

File: SRC-04-035-51762 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its Chairman-Managing Director as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that provides investigation, surveying, and consulting services for the maritime industry. The petitioner claims that it is the affiliate of Caribbean Marine and P&I Services Limited, located in Kingston, Jamaica. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence of record shows that the beneficiary will be employed in a primarily managerial or executive capacity, and that the director abused her discretion in denying the petition. In support of these assertions, counsel submits a brief, additional evidence, and previously submitted documentation.

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

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

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

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

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

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

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

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

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

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

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter submitted with the initial petition on November 18, 2003, the petitioner described the beneficiary's job duties as follows:

> [The beneficiary] is currently working for [the petitioner] and he will continue to serve in his managerial capacity as Chairman-Managing director in charge of planning, developing and establishing the policies and objectives of the company.
>
> * * *
>
> The primary duty of this position involves complete executive decision making authority for the development of the business in the United States. His duties include establishing policies and procedures for financial management, market definition, pricing structure and outside professional relationships, setting sales and revenues targets, and directing the management of daily operations.
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> * * *
>
> [The beneficiary] has autonomous control over, and exercises discretionary decision-making in, establishing the most advantageous course of action for the successful management and direction of development activities.

On November 28, 2003, the director requested additional evidence. In part, the director requested: (1) a description of the duties of the petitioner's employees, if applicable; (2) an explanation of how the beneficiary will not engage in the day-to-day operations of the business, and how he will be primarily engaged in managerial or executive duties; (3) copies of the petitioner's Employer's State Quarterly Tax Returns with all

attachments for the previous two quarters; (4) a copy of the petitioner's IRS Form 940EZ, Employer's Annual Federal Unemployment Tax Return; and (5) a copy of the petitioner's 2002 IRS Form 1120, U.S. Corporation Income Tax Return.

In a response filed on December 2, 2003, in part the petitioner submitted a letter from counsel, and copies of its state and federal quarterly tax returns for the second and third quarters of 2003. In counsel's letter, he stated the following:

> There is one direct employee of the petitioner, who reports to . . . the beneficiary. The employee . . . runs the daily office matters of the company . . . . In addition to clerical and accounting duties, [the beneficiary's subordinate] acts as liaison between [the beneficiary] and the 15 marine surveyors/investigators who are retained as required when a ship is damaged or cargo damaged throughout the Caribbean, South America, the Gulf of Mexico and the Florida coast.
>
> [The beneficiary's subordinate] has a Bachelors degree in Spanish, and is currently working on a Masters degree. Her ability to communicate in both English and Spanish is essential, as many of the ports and countries where the company operates are Spanish speaking.
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> The beneficiary . . . is not engaged in the day to day operations of the office, and is primarily engaged in an executive role. His work is mainly in overseeing the network of personnel developed in the geographic areas served by the company, communicating with the ship owners, charterers, shippers and overseas insurers who retain [the petitioner] when a ship runs aground, damages property, or cargo being shipped is damaged.
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> * * *
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> [T]he petitioner company has individuals throughout the region served by the company that have been trained in handling marine accidents and investigations in a manner required by the petitioner, the companies it serves, and the overseas insurers. The company has surveyor/investigators in Florida also for local incidents.

Counsel noted that, as the petitioner did not commence operations until 2003, the petitioner did not file a 2002 IRS Form 1120, U.S. Corporation Income Tax Return.

On December 11, 2003, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated that the petitioner did not show that the beneficiary will be managing other professionals or managers, and it appears that the beneficiary will have to engage in the day-to-day business activities of the company.

On appeal, counsel for the petitioner asserts that the evidence of record shows that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel alleges that the director's denial

erroneously contradicts Citizenship and Immigration Services' (CIS) prior decision to accord the beneficiary L-1A status "on the basis of the same set of fact [sic] and circumstances." Counsel cites *Kaliski v. District Director of Immigration and Naturalization Service*, 620 F.2d 214 (9th Cir. 1980), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the director abused her discretion by failing to provide "clear and convincing evidence to support [her] denial of [the] previously granted visa." Counsel further asserts that the director limited her analysis of the beneficiary's duties to the requirements of managerial capacity, and failed to consider whether the beneficiary satisfies the requirements for executive capacity. Counsel states that the director's decision was "based on an improper understanding of law," and it was "arbitrary and capricious." Counsel discusses the beneficiary's duties as follows:

> [The beneficiary] is clearly carrying out duties of an executive nature . . . . [The beneficiary] who is the Chairman and the Managing director of both the parent and the subsidiary organization in the US clearly does not take any direction from anyone in the US or within the parent organization but only general control exercise [sic] by the shareholder of the organization. Thus, the beneficiary fulfills an important aspect of the Regulation concerning discretionary powers.
>
> There can be no argument to the proposition that as the Chairman and managing director of the organization the beneficiary does indeed direct the management of the subsidiary company. This fulfills a second criterion set-forth in the Regulations.
>
> In his capacity as the Chairman and the Managing Director the beneficiary also establishes the goals and policies of the organization. This fulfills the third criterion mentioned in the Regulations.
>
> Finally the Chairman Managing Director of any organization would have wide latitude in discretionary decision-making. The beneficiary in this case has also wide latitude in discretionary decision-making.
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> * * *
>
> Establishing strategic relationships is a key job duty of the managing director. Since the world P&I clubs is a limited and closed universe it is important for a new entrant in a market (such as [the petitioner]) to establish strategic relationships with other players in this realm. [The beneficiary] provides the leadership and guidance for this task, which is entirely executive in nature.
>
> Providing a strategic vision for the growth of the company is yet another task, purely of an executive and managerial nature expected of [the beneficiary].

Counsel references recent negotiations carried out by the beneficiary for services to be provided by the petitioner. Counsel states:

> [I]n order to negotiate major contracts . . . [the] beneficiary had to carry out extensive background work, negotiations and deciding critical elements of the proposed business partnership. [The] [b]eneficiary had to determine the nature and extent of the proposed partnership, manage various aspects and issues that arise during negotiations, determine appropriate level of support for each other, defining the roles of the two companies, defining areas of cooperation, discussing any limitations such as geographical limitations, discussing financial issues, discussing liability issues and discussing nature of support personnel to be hired to carry out the functions of proposed joint venture and many other complex issues. These jobs are most certainly within the purview of Executive and Managerial nature.

Counsel cites a Board of Immigration Appeals (BIA) Interim Decision, *Matter of Continental Grain Company*, 14 I&N Dec. 140, Interim Decision (BIA 1972), in which the BIA found that the beneficiary was employed in a primarily executive capacity, and asserts that the facts of the present matter are sufficiently similar to warrant the same finding. Counsel cites numerous matters and decisions to stand for the proposition that a court may overturn a CIS decision where there has been an abuse of discretion, and that CIS must adhere to Congress's intent in adjudicating a visa petition.

Upon review, counsel's assertions are not persuasive. As a preliminary matter, the AAO will address counsel's assertion that the director erred in denying the petitioner's petition for an extension of the beneficiary's status when CIS previously approved a petition based on similar facts. Established precedent reflects that prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, the petitioner's prior petition to which counsel refers was a petition to allow the beneficiary to enter the United States to open a new office. Thus, that petition was governed by the regulations pertaining to new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). The present petition is a request for an extension of the beneficiary's status after completing a one-year period to open a new office. Thus, the present petition is governed by a different set of regulations pertaining specifically to new office extensions. *See* 8 C.F.R. § 214.2(l)(14)(ii). As different law and evidentiary requirements apply to the present petition, the director has a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. Contrary to counsel's suggestion, the fact that a prior petition was approved on behalf of the beneficiary does not serve as prima facie evidence that eligibility has been established in the present proceedings.

Further, counsel asserts that the director must support her negative findings by clear and convincing evidence. The AAO notes that 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. The director does not have an affirmative burden to present evidence to bolster negative findings. In support of counsel's contention, he cites *Kaliski v. District Director of Immigration and Naturalization Service*, 620 F.2d 214 (9th Cir. 1980), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988). It is noted that both of these cases relate to immigrant visa petitions, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. *See* 8 C.F.R.

§ 214.2(l)(14)(ii). As counsel has not discussed the facts of the cited matters, they will not be considered further in this proceeding.

Additionally, regarding *Mars Jewelers, Inc. v. INS,* in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

As noted above, counsel asserts that the director limited her analysis of the beneficiary's duties to the requirements for managerial capacity, and failed to consider whether the beneficiary satisfies the requirements for executive capacity. Counsel states that the director's decision was "based on an improper understanding of law," and it was "arbitrary and capricious." When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Upon review of the director's decision, the AAO agrees that the reasons given for the denial are conclusory with few specific references to the evidence entered into the record. As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. In the instant matter, the petitioner and counsel have represented that the beneficiary is employed in both a managerial and an executive capacity. For example, in the initial petition the petitioner stated that the beneficiary "will continue to serve in his managerial capacity." Yet, on appeal counsel repeatedly asserts that the beneficiary's duties are "executive in nature," and refers to the "managerial nature" of some of the beneficiary's tasks. If the petitioner intends for the beneficiary to be employed in both a primarily managerial and executive capacity, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act.

The initial job description submitted by the petitioner was brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the broad statement that the beneficiary is "in charge of planning, developing and establishing the policies and objectives of the company" does not indicate what tasks the beneficiary will perform on a daily basis. The statement that "[the beneficiary] has autonomous control over, and exercises discretionary decision-making in, establishing the most advantageous course of action for the successful management and direction of development activities" does not explain the beneficiary's actual daily duties. On appeal, counsel discusses the beneficiary's duties primarily by making conclusory statements regarding the tasks customarily associated with his managerial title, and by paraphrasing the statutory definition for executive capacity. Specifics are clearly an important

indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will primarily perform, such that they can be classified as managerial or executive in nature.

Counsel indicates that the beneficiary's "work is mainly in overseeing the network of personnel developed in the geographic areas served by the company, communicating with the ship owners, charterers, shippers and overseas insurers who retain [the petitioner] when a ship runs aground, damages property, or cargo being shipped is damaged." Counsel states that there are "15 marine surveyors/investigators" who the petitioner hires on a contract basis, and suggests that their work is coordinated by the beneficiary. However, the petitioner has not provided evidence of hiring these workers, such as documentation of payments made to them, or contracts for their services. 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).

Counsel references the beneficiary's efforts in participating in contract negotiations that are important to the petitioner's operations. While contract negotiations could be considered an executive task, the petitioner has not shown that such negotiations constitute the majority of the beneficiary's time. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Counsel claims that the beneficiary supervises one subordinate employee, who "runs the daily office matters of the company," performs "clerical and accounting duties," and "acts as liaison between [the beneficiary] and the 15 marine surveyors/investigators." Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, counsel indicates that the beneficiary's subordinate completed a bachelor's degree in Spanish. However, the petitioner has not established that a bachelor's degree is actually necessary

to perform the clerical work of the beneficiary's subordinate. Nor has the petitioner shown that the beneficiary's subordinate supervises other staff members or manages a clearly defined department or function of the petitioner, such that she could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employee is supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The AAO further notes that the petitioner's IRS Forms 941, Employer's Quarterly Tax Return, and Florida State Employer's Quarterly Reports for the second and third quarters of 2003 state that the petitioner had one employee during those periods, namely the beneficiary. Therefore, the petitioner has failed to submit documentation that the beneficiary's claimed direct subordinate is in fact employed by the petitioner. Again, 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).

Counsel cites BIA Interim Decision, *Matter of Continental Grain Company*, 14 I&N Dec. 140, Interim Decision (BIA 1972), in which the BIA found that the beneficiary was employed in a primarily executive capacity, and asserts that the facts of the present matter are sufficiently similar to warrant the same finding. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cited matter. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. at 190. Counsel's analysis is limited to conclusory assertions and paraphrased language of the statutory definition of executive capacity.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not established that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the petitioner has not established that it has a qualifying corporate relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to submit "[e]vidence that the United States and foreign entities are still qualifying organizations." On the initial petition, the petitioner indicated that it is the affiliate of the beneficiary's foreign employer. Yet, the petitioner has failed to submit documentation to

show the ownership of the foreign entity or the petitioner. Again, 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. at 190. For this additional reason, the appeal will be dismissed.

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).

In visa 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.