Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: EAC 09 126 50988 Office: VERMONT SERVICE CENTER Date: AUG 03 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of an SAS Programmer Analyst as an H-1B nonimmigrant in a specialty occupation pursuant to § 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petitioner is a software consulting and development, clinical research and staff augmentation firm.

The director denied the petition on the following grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; (2) the petitioner failed to establish that the U.S. Department of Labor's Form ETA 9035E Labor Condition Application (LCA) corresponds to the petition; and (3) the petitioner failed to submit an itinerary.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the Form I-129 submitted on March 30, 2009, the petitioner, headquartered in [redacted] listed 40 employees and indicated that it wished to employ the beneficiary as an [redacted] from March 30, 2009 through March 30, 2012 either in [redacted] or [redacted] at an annual salary of $61,000. In the petition support letter, the petitioner states:

> [The petitioner] hires employees based upon the corporate strategies, business projections, emerging trend analysis, and skill sets requirements forecast. Projects can be broadly classified as client projects and in-house projects. Client projects can be performed on-site (client site) or off-site (at OSR's facilities). In-house projects are comprised of software product development, OSR internal systems, and/or development of sophisticated systems tools. On-site and off-site client projects are determined by client's needs and specifications.
>
> While [the petitioner's] IT and/or clinical research professional may be temporarily located at a project site no contractual or employment relationship exists between the client and the consultant. At all times, each professional remains a full-time staff employee of [the petitioner], operating under the direct supervision and control of the responsible leader. [The petitioner's] hiring needs are determined by our contracts with clients for their current and anticipated needs. . . .

The duties of the position are described as follows in the support letter the petitioner submitted with the H-1B petition on behalf of the beneficiary:

> [P]lans, develops, tests and documents computer programs, applying knowledge of

> programming techniques and computer systems. Furthermore, as [redacted] the beneficiary shall be responsible for providing statistical programming support to clinical trials for regulatory submission. Duties include: Support Data Management in data creations/transfers, integrity checks, and audits. Support Biostatistics in statistical analysis, including generating data listing, tables, and figures for clinical trials. Develop and maintain the infrastructure for project files of SAS datasets and SAS codes. Act as a liaison between clinical and subcommittees and project teams on an as-needed basis. Maintain knowledge and ability to perform all functions of a Statistical Programmer, or has equivalent expertise. Perform more complex programming than first level, and has greater participation in creating and maintaining department standards, e.g., SOPs, standard macros, and other SAS programs. Provide mentoring to junior level Statistical Programmers. Furthermore, the beneficiary shall be responsible for performing data analysis, statistical analysis, generate reports, listing and graphs using SAS tools. . . .

Regarding the minimum qualifications, the petitioner states that the proffered position requires at least a "[B]achelor of Science or comparable degree in basic or applied science area (e.g.: nursing, biology, chemistry, medical technology, pharmacology, dentistry, Biotechnology, Biomedical Engineering, Pharmaceutical Sciences), electrical engineering, electronics and instrumentation, computer science and or related discipline."

The petitioner submitted a copy of the beneficiary's education documents, which indicates that she has a U.S. Master of Arts degree in economics.

The submitted [redacted]) was filed for an [redacted] Programmer Analyst to work in [redacted] from March 30, 2009 to March 30, 2012. The LCA lists a prevailing wage of $50,918 in South Plainfield, NJ and $60,258 in Wilmington, DE.

On April 20, 2009, the director issued an RFE requesting, in part, more detailed information regarding the location where the beneficiary will work, including the name and address of the business where she will work together with a letter from the business at that location. The director also requested copies of all contracts and work orders regarding any business to which the beneficiary would be assigned.

Counsel for the petitioner responded to the RFE, stating that the beneficiary will be working at the petitioner's headquarters as well as the client location in [redacted]. Counsel also stated that the beneficiary would spend 50% of her time on program development for clinical trial report, 30% of her time on program validation, and 20% on data analysis plan and program requirement specifications.

Additionally, counsel submitted a copy of a contract between the petitioner, which is listed as being located in [redacted] and a company called [redacted], which is located in Norristown, PA. The contract is regarding the provision of services by [redacted] to another company called Incyte Corporation. The agreement is dated March 26, 2009 and the duration of the agreement is from March 20, 2009 to February 28, 2010, or less than one year. The beneficiary is not mentioned by name in the contract

and the scope of work indicated is for the petitioner to provide [redacted] Programmer-editing tables and listings. No copies of contracts between [redacted] were provided.

The director denied the petition on July 1, 2009

For the first time on appeal, counsel submits a letter from Incyte, the third-party client mentioned in the contract submitted in response to the RFE. The letter is dated July 15, 2009, and states that Incyte has contracted the petitioner to provide the services of various consultants for statistical programming projects. The letter provides the beneficiary's name and states that she will work at [redacted] Although the letter states that Incyte has contracted with the petitioner, the petitioner has not provided evidence that it has a contract directly with Incyte. Also for the first time on appeal, counsel provides a revised Contractor Agreement, dated July 16, 2009, between the petitioner and [redacted] which states that "[the petitioner] will provide services of [the beneficiary] as [redacted] Programmer-editing tables and listings at Incyte Corporation." The revised contract listing the beneficiary's name and her assignment is dated after the petition was filed. Therefore, the petitioner has not demonstrated that it received final confirmation of the particular project on which the beneficiary would work at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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). Moreover, the AAO notes that the revised contract is for less than one year and so does not cover the petition's requested duration.

Additionally, the proposed duties for the beneficiary as written in the Contract indicate that her work will be limited to editing tables and listings at [redacted], thereby conflicting with the position description provided in the support letter, which stated that the beneficiary would be responsible for providing statistical programming support to clinical trials for regulatory submission as well as creating and maintaining department standards and providing mentoring to junior level Statistical Programmers both at the petitioner's offices and in Delaware. Moreover, the letter from Incyte Corporation submitted on appeal provides only a vague and generic description of the beneficiary's proposed duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO will first consider whether the proffered position is a specialty occupation. Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

(*1*) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(*2*) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(*3*) The employer normally requires a degree or its equivalent for the position; or

(*4*) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In addressing whether the proposed position is a specialty occupation, the AAO agrees with the director's determination that the record is devoid of documentary evidence as to where and for whom the beneficiary would be performing her services, and therefore whether her services would actually be those of an SAS Programmer Analyst.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content.

As mentioned above, the evidence indicates that the petitioner would subcontract the beneficiary to [redacted] which in turn would assign the beneficiary to [redacted] located in Delaware. The petitioner did not provide a copy of the contract between [redacted] and the job description provided in the contract and the letter from [redacted] appeared to entail duties performed at a much more basic level than those provided in the petitioner's support letter. The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. Merely providing contracts between the petitioner and other consultants or employment agencies that provide consulting or staffing services to other companies is not sufficient. There must be sufficient, corroborating evidence in the record that demonstrates not only actual, non-speculative employment for the beneficiary, but also enough details and specificity to establish that the work the beneficiary will perform for the end-client(s) will be in a specialty occupation. In this instance, such corroborating evidence includes a clear contractual path shown from the petitioner, through any other consultants or staffing agencies, to an ultimate end-client, detailing the project the beneficiary will be assigned to and the duties and/or services the beneficiary will be expected to perform and/or provide.

Additionally, the documentation provided by the petitioner on appeal indicates that the beneficiary's assignment at [redacted] would be for less than one year, which does not cover the duration of the petition. The revised contract provided on appeal, which lists the beneficiary by name, is dated after the petition was filed and therefore it is not clear that the petitioner knew to which project the beneficiary would be assigned at the time the petition was filed. However, even if the beneficiary were assigned to [redacted] as the record lacks documentary evidence of any work beyond the short-term project, and as the project listed in the contract and in [redacted] letter is not described in sufficient detail to determine the beneficiary's day-to-day responsibilities and role in that project, the petitioner has not established a foundation by which USCIS can reasonably determine either the level of knowledge in any specific specialty that would be required by or associated with the proffered position or that the petitioner had any specific employment designated for the beneficiary at the time the petition was filed. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1) and 103.2(b)(12). 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 AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. As discussed above, the record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

As the record does not contain sufficient evidence of the specific duties the beneficiary would perform for the petitioner's client(s), the AAO cannot analyze whether her placement is related to the provision of a product or service that requires the performance of the duties of an [redacted] Programmer Analyst. Applying the analysis established by the Court in *Defensor*, which is appropriate in an H-1B context, like this one, where USCIS has determined that the petitioner is not the only relevant employer for which the beneficiary will provide services, USCIS has found that the record does not contain any documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. While the AAO acknowledges counsel's submission of advertisements from other employers for SAS Programmer Analysts, insufficient evidence has been provided regarding the proffered position in order to determine whether the proffered position is sufficiently similar to those listed in the advertisements.

Additionally, the AAO notes that the petitioner's own stated minimum requirements for the position, which is at least a Bachelor's degree in a "[b]asic or applied science area (e.g.: nursing, biology, chemistry, medical technology, pharmacology, dentistry, Biotechnology, Biomedical Engineering, Pharmaceutical Sciences), electrical engineering, electronics and instrumentation, computer science and or related discipline," indicates an acceptance of such a wide and varied range of fields. Therefore, the petitioner has not demonstrated that it

requires at least a Bachelor's Degree in a *specific specialty* for the proffered position, as required under 8 C.F.R. § 214.2(h)(4)(ii).[1]

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Next, the AAO also affirms the director's finding that the petitioner failed to establish that the LCA corresponds to the petition. For this additional reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

> The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application . . . .

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E), which states:

> *Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

---

[1] It is also noted that the *Handbook* does not support a finding that the proffered position of [redacted] Programmer Analyst normally requires a bachelor's or higher degree or its equivalent in a specific specialty. Although the *Handbook* indicates that a bachelor's degree in a technical field may be preferred or sought by prospective employers of systems analysts, it does not state that such a degree or its equivalent is a minimum requirement for entry into this field.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the period of work to be performed at the new location.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition,* whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Emphasis added].

[redacted] and Form I-129 in this matter, which indicate the proffered position's location as being either in [redacted] for the duration of the petition, do not correspond with the contract provided by the petitioner, which was only valid for less than one year and, moreover, did not reference the beneficiary as being assigned to a project in Wilmington, DE until after the petition was filed. In light of the fact that the record of proceeding indicates that the beneficiary will likely work at locations not identified in the Form I-129 and the LCA filed with it, USCIS cannot ascertain that this LCA actually supports and corresponds to the H-1B petition. *See id.* As discussed above, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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).

Therefore, the director's conclusion that the petitioner failed to establish that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period is affirmed.

Third, the AAO will examine whether the petition must be denied for the additional reason that it was filed without an itinerary of the dates and locations where the beneficiary would work. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

> *Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The language of the regulation, which appears under the subheading "Filing of petitions" and uses the mandatory "must," indicates that an itinerary is required initial evidence for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted, at the time of the petition's filing, at least the employment dates and locations.

On appeal, counsel states that the amended contract between the petitioner and Yoh Services, LLC constitutes an itinerary. As mentioned previously, this document was dated after the petition was filed and covers less than one year of the petition's duration. Consequently, the amended contract does not constitute an itinerary for purposes of 8 C.F.R. § 214.2(h)(2)(i)(B). The AAO therefore affirms the director's finding that the petitioner failed to submit an itinerary as required under 8 C.F.R. § 214.2(h)(2)(i)(B) and denies the petition on this additional ground.

Beyond the decision of the director, the AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the beneficiary has a U.S. Master's degree in economics and, therefore, does not appear to qualify for the proffered position based on the petitioner's stated requirements, which did not indicate economics as one of the fields in which the Bachelor's Degree could be obtained. As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)." The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.