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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: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 01 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: SELF-REPRESENTED

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,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the instant 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.

On the Form I-129 visa petition the petitioner stated that it is a software development firm. To employ the beneficiary in a position designated as a programmer analyst, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 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 appeal is filed to contest each of the independent grounds upon which the director denied this petition, namely, the director's separate determinations that the petitioner failed to establish: (1) that the petitioner will employ the beneficiary in a specialty occupation position, (2) that the Labor Condition Application (LCA) in this case is valid for the location where the beneficiary would be employed, and (3) that the petitioner failed to provide an itinerary with the initial evidence as required by 8 C.F.R. § 214.2(h)(2)(i)(B).

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's[1] brief and attached exhibits in support of the appeal.

Based upon its review of the entire record of proceedings, as supplemented by this appeal, the AAO finds that the director was correct to deny the petition on each of the independent grounds that he cited in his decision. While fully affirming the director's decision, the AAO will further address in detail only the specialty occupation basis of the director's decision, as specialty occupation status is the first eligibility requirement that must be established and, without it, the remaining issues in this proceeding become moot.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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[1] The petitioner is ostensibly represented by counsel. The record contains a Form G-28 Notice of Entry of Appearance and other documents signed by the petitioner's claimed counsel. However, on June 21, 2010, the AAO sent a facsimile transmission to counsel requesting, pursuant to 8 C.F.R. § 292.4(a), that he or she submit, within five business days, evidence showing admission to the bar and a certificate of good standing. Counsel did not respond to that request. All representations will be considered, but the petitioner's counsel will not be recognized as counsel of record and will not receive a copy of this decision.

Section 214(i)(l) of 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.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) 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 (2) 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, the 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.

The regulation at 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

a particular position 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) (hereinafter referred to as *Defensor*). 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not 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 Department of Labor's *Occupational Outlook Handbook* (the *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 alien will likely perform for the entity or entities ultimately determining the work's content.

In an RFE dated October 7, 2008, the service center requested, *inter alia*, (1) evidence that the beneficiary would be performing in a specialty occupation, and (2) an itinerary of the beneficiary's prospective employment.

In response, counsel submitted various contracts pursuant to which the petitioner agreed to provide its employees to work for companies on those other companies' projects.

In one of the contracts, the petitioner agreed to provide services to Modis, Inc., of Jacksonville, Florida,

> . . . at work sites of [Modis, Inc's] client, JP Morgan Chase & Co., including for purposes of this Agreement any of its parent(s), affiliates, subsidiaries, divisions, partners, joint ventures, and any of its or their predecessors, successors and assigns . . . .

The other contracts do not indicate where the work will be performed.

A contract with [redacted] of Sunnyvale, California states that the petitioner's consultants who are hired pursuant to that contract must be approved in advance by the contracting company. Nothing in the

record, however, indicates that any one of the contracting companies have agreed to utilize the beneficiary's services.

The contract with [redacted] also states that the petitioner's workers will report directly to an employee of [redacted] to be designated, that each worker "shall provide [his or her] services in accordance with the instructions of such employee or other employee[s] designated by [[redacted]]," and that [redacted] shall be the sole judge of whether the petitioner's worker or workers are performing adequately.

The contract with [redacted] further specifies:

> Each [of the petitioner's consultants'] duties shall include, but are not limited to, those duties set forth in Part 2 of each Consultant Schedule and such other duties as the [company contracting with the petitioner] may from time to time prescribe.

The record contains no Consultant Schedule, and no indication, therefore, of the duties the beneficiary would perform if his services were utilized pursuant to that contract.

A contract between the petitioner and [redacted], of Santa Clara, California, indicates that the petitioner "acknowledges and agrees that it will be performing web design, maintenance, and/or other services related to internet distribution or publication during the course of performing under this Agreement." Other than that contract and the contract with [redacted], none of the contracts contains any statement describing the duties the petitioner's workers would perform.

In summary, one contract states that the petitioner's workers will work at various, undisclosed, locations. The remaining contracts do not indicate where work would be performed pursuant to those contracts. One contract states that the petitioner's workers will report to another company's employee, who will oversee their work. The other contracts do not specify who will supervise the petitioner's workers. One contract states that that company with which the petitioner contracted may alter the duties of the petitioner's workers from time to time, and another indicates that the petitioner's workers will be performing web design, maintenance, *etc.* None of the other contracts contain any statement of the duties the petitioner's workers might perform. Again, none of the contracting companies agreed to utilize the services of the beneficiary.

Initially, the AAO notes that it recognizes the *Handbook*[2] as an authoritative source on the duties and educational requirements of a wide variety of occupations. The position of programmer-analyst is included in the *Handbook* discussion of computer systems analyst positions. Pertinent to the duties of such positions, the *Handbook* states:

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[2] The *Handbook,* which is available in printed form, may also be accessed on the Internet, at http: www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed August 9, 2010.

> They may design and develop new computer systems by choosing and configuring hardware and software, or they may devise ways to apply existing systems' resources to additional tasks.
>
> . . . .
>
> [S]ystems analysts consult with an organization's managers and users to define the goals of the system and then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and a variety of accounting principles to ensure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.
>
> . . . .
>
> [S]ystems analysts oversee the implementation of the required hardware and software components. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then they work with programmers to "debug," or eliminate errors, from the system. Systems analysts who do more in-depth testing may be called *software quality assurance analysts*. In addition to running tests, these workers diagnose problems, recommend solutions, and determine whether program requirements have been met. After the system has been implemented, tested, and debugged, computer systems analysts may train its users and write instruction manuals.
>
> . . . .
>
> In some organizations, *programmer-analysts* design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks.

Pertinent to the education and training required for those positions, the *Handbook* states:

> When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking

> individuals who have a master's degree in business administration (MBA) with a concentration in information systems.
>
> Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

As evident above, the *Handbook* indicates that employers often seek or prefer at least a bachelor's degree level of education in a technical field for programmer analyst positions. In light of the range of educational credentials indicated by the *Handbook* as associated with the programmer analyst occupation, however, the *Handbook* does not indicate that programmer-analyst positions normally require a bachelor's degree in a specific specialty. Thus, demonstrating that the proffered position is, in fact, a programmer analyst position would not demonstrate that it qualifies as a position in a specialty occupation.

Further, whether the proffered position is correctly designated a programmer analyst position is unclear. Only one of the contracts provided specified any of the duties that the petitioner's employees would perform, and those were duties pertinent to web design and maintenance. Web design and maintenance are not typical duties of programmer analysts, but rather of computer network, database, and systems administrators.

As to the education and training required for computer network, database, and systems administrators, the *Handbook* states,

> Network and computer systems administrators often are required to have a bachelor's degree, although an associate degree or professional certification, along with related work experience, may be adequate for some positions.

The *Handbook* does not support the proposition that positions that involve web design and maintenance require a minimum of a bachelor's degree or the equivalent in a specific specialty.

Further still, the record does not indicate that the petitioner exercises control over the duties assigned to its claimed employees. One of the contracts provided makes explicit that the end-user will determine the duties of the petitioner's workers whom it utilizes.

Evidence in the instant case does not demonstrate that the petitioner will employ the beneficiary on its own projects. The record, in fact, contains no evidence that the petitioner has any projects of its own. Rather, the evidence strongly suggests that the petitioner intends to provide the beneficiary to other companies to work for them, and to charge those other companies for the beneficiary's services. The evidence suggests that the petitioner will not exercise control over the beneficiary's duties, and might not even know what those duties were if the beneficiary were currently contracted by the petitioner to work for an end-user.

The petitioner is obliged, in order to demonstrate that the proffered position is a position in a specialty occupation within the meaning of section 214(i)(1) of the Act, to provide a comprehensive description of the beneficiary's proposed duties from an authorized representative of that client of the petitioner who will be the end user of the beneficiary's services. The record does not demonstrate, however, that any such end user has been identified.

In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now USCIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the proposed beneficiaries require a bachelor's or higher degree or its equivalent for entry into that position. The court found that the degree requirement should not originate with the employment agency that brought the beneficiaries to the United States for employment with the agency's clients, as it is the work performed for these clients and their business needs that 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. Because the petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation, the petition was correctly denied. That basis for denial has not been overcome on appeal, and the appeal will be dismissed and the petition denied for that reason.

Another basis for the director's denial of the petition was the director's finding that the petitioner had not demonstrated that the LCA provided to support the visa petition corresponds with that petition. The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part, that in determining whether to approve a Form I-129 visa petition ". . . [USCIS] determines whether the petition is supported by an LCA which corresponds with the petition . . . ." In order for an H-1B petition to be approvable, the location shown on the supporting LCA must correspond to the location where the beneficiary would work, as that location determines the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay. See § 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The LCA submitted to support the instant visa petition indicates that the beneficiary would work in Somerset, New Jersey. The record, however, contains no evidence to support the proposition that the beneficiary would work at the petitioner's offices or for any end-user company in Somerset, and the petitioner has not, therefore, demonstrated that the LCA provided corresponds with the instant

visa petition. The petition was correctly denied on this additional basis, which has not been overcome on appeal, and the appeal will be dismissed and the petition denied for this additional reason.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. 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)(12). 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). For this reason also, the appeal will be dismissed and the petition denied.

As was noted above, the director also denied the visa petition because the petitioner failed to provide required initial evidence, specifically, an itinerary of the locations where the beneficiary would work and the dates when he would work there.

The petitioner is obliged, by 8 C.F.R. § 214.2(h)(2)(i)(B), to provide an itinerary as initial evidence submitted with the visa petition. The petitioner has not complied with that requirement, and the appeal will be dismissed and the petition denied for this additional reason. The petitioner's failure to provide an itinerary raises another issue, however, in addition to failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B).

Rather than merely denying the visa petition because of the petitioner's failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B), the service center requested, in the October 7, 2008 RFE, that the petitioner provide an itinerary of the beneficiary's proposed employment. The petitioner did not comply with that request.

Even if the petitioner were not compelled by 8 C.F.R. § 214.2(h)(2)(i)(B) to provide an itinerary as part of the initial evidence in this matter, the regulations provide the director with broad discretionary authority to request evidence in support of a petition. Specifically, pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Moreover, in addition to 8 C.F.R. § 214.2(h)(9)(i), the regulation at 8 C.F.R. § 103.2(b)(8) provides the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue a request for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted

by the petitioner, both initially and in response to any request for evidence that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

The AAO finds that, in the context of the record of proceedings as it existed at the time the request for evidence was issued, the request for itinerary evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the period of employment requested in the petition.

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). Here, in addition to being required initial evidence, as the detailed itinerary was material to a determination of whether the work to be performed by the beneficiary would be in a specialty occupation, the petitioner's failure to provide this specifically requested evidence precluded a material line of inquiry. As such, the petition must be denied for this additional reason.

The record suggests an additional issue that was not discussed in the decision of denial.[3] The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

> (h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
>
> (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
>
> (3) Has an Internal Revenue Service Tax identification number.

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[3] The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and this additional basis for denial caught the AAO's attention during its independent, *de novo* review of the record of proceeding.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf."

The AAO notes that the petitioner has not claimed to be an agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F), and the record does not indicate that the petitioner is such an agent. The remaining issue is whether the petitioner qualifies as an employer within the meaning of the term as used in 8 C.F.R. § 214.2(h)(2)(i)(A) and 8 C.F.R. § 214.2(h)(4)(ii).

To qualify as a United States employer, a petitioner must satisfy all three of the criteria at 8 C.F.R. § 214.2(h)(4)(ii). With regard to the requirement at 8 C.F.R. § 214.2(h)(4)(ii)(2) that a U.S. employer have an employer-employee relationship with its beneficiary, the AAO notes that one of the contracts submitted as evidence that the petitioner would employ the beneficiary in a specialty occupation indicates that an employee of another company would assign the beneficiary's duties and supervise him. This indicates that, if the beneficiary worked on that company's projects, the petitioner would not have an employer/employee relationship with the beneficiary. None of the other contracts specify who would supervise the beneficiary's work if he performed it pursuant to those contracts.

The evidence does not indicate that the petitioner would be the beneficiary's employer within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A) and 8 C.F.R. § 214.2(h)(4)(ii) and does not, therefore, demonstrate that the petitioner was qualified to submit the instant visa petition. The visa petition should have been denied for this additional reason. The visa petition shall now be denied on that basis also.

The petition will be denied for all of 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 the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 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. The appeal will be dismissed and the petition denied.

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