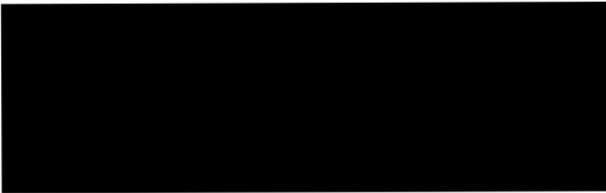


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U.S. Citizenship
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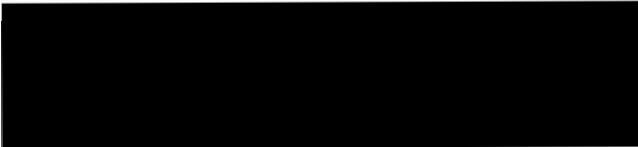
File: EAC 07 228 52408 Office: VERMONT SERVICE CENTER Date: FEB 17 2009

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation, states that it is engaged in the import and sale of “gourmet confections, coffee and equipment.” The petitioner claims to have a qualifying relationship with Industrial C [REDACTED], located in Lima, Peru. The petitioner seeks to employ the beneficiary as its marketing manager for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would 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, the petitioner submits a more detailed description of the beneficiary’s proposed duties in the United States and asserts that he will be employed in a managerial capacity.

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 sole issue addressed by the director is whether the petitioner established that the beneficiary would 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.

The petitioner filed the nonimmigrant petition on July 27, 2007. In a letter dated July 24, 2007, the petitioner described the beneficiary's proposed duties as follows:

The Marketing Manager will be responsible for locating and pinpointing the potential markets. This will be performed based on survey and detailed demographic research. Due to the fact that our product is gourmet confection and equipment, the Marketing Manager will determine the source of demand for gourmet confections, equipment, confections, and

products. The Marketing Manager will prepare detailed reports to present to the President. Together, they will review the anticipated costs for distribution and immediate profitability of the different locales. Thereafter, the marketing Manager will prepare reports on with whom, where, and when to make contact with the appropriate personnel or other chosen personnel to make contact and negotiate the potential market. . . . Additionally the Marketing Manger [sic] will design together with the Sales Manager the different promotions and plans or strategies directed to increase the number of consumers of the products that the company would be marketing. He will be responsible for designing the flyers and announcements that will be published in the different advertising medias [sic] such as newspapers, magazines and other medias [sic]. Furthermore he will be responsible for bringing together and leading a creative team to work on each account and marketing campaign as well as coordinating the work of outside contractors who are and/or will be engaged to perform services on the accounts.

The petitioner stated that the U.S. company “is dedicated to installing and supplying the necessary equipment and our coffee product using the technology of Café Fetelli Pod System to woners [sic] of coffee stands as well, and other facilities that sale [sic] and/or provide coffee in addition to their normal operations of selling food and soft drinks.”

The petitioner indicated that the U.S. company has five employees, and noted that the position to be filled by the beneficiary recently became vacant. The petitioner submitted an organizational chart depicting a general manager, a sales manager, a marketing manager identified as [REDACTED], a salesman and assistant manager, and a driver. The petitioner identified a vacant position subordinate to the marketing manager. The petitioner submitted a number of IRS Forms 941, Employer’s Quarterly Federal Tax Return, and Florida Forms UCT-6, Employer’s Quarterly Report, but all of the submitted documents were from 2005 and 2006. The most recent Form UCT-6 submitted, for the first quarter of 2006, showed that wages were paid to the five employees identified on the organizational chart during that period.

The director found the initial evidence to be insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the director issued a request for additional evidence (RFE) on October 10, 2007, in which he requested, *inter alia*, the following: (1) a comprehensive description of the beneficiary’s duties with an explanation as to how those duties would be managerial or executive in nature; (2) a list of the U.S. company’s employees and a complete position description for all employees in the United States; (3) a complete copy of the U.S. company’s IRS Forms 941 for the first two quarters of 2007; (4) copies of all Forms W-2 and 1099 issued in 2006; (5) copies of the company’s Forms W-3 and 1096 for 2006.

In a response dated November 21, 2007, counsel for the petitioner stated the following with respect to the director’s request for a comprehensive description of the beneficiary’s duties:

Our previously submitted letter details the job duties that the Beneficiary will be performing in the United States. Additionally, the Beneficiary will be responsible for replacing and overseeing [REDACTED], who is currently employed by [the petitioner] in the marketing department. Additionally, [the beneficiary] will be responsible for hiring further

marketing staff in order to ensure that the strategy and campaign created by [the beneficiary] and approved by [the petitioner] [sic].

The petitioner submitted an employee list identifying the same individuals depicted on the previous organizational chart. The petitioner indicated that the beneficiary would perform the following duties as marketing manager:

Will be responsible for all marketing strategies including pinpointing the potential markets and design the marketing campaigns promoting the product along with the general manager. He will be directing and supervising the marketing staff to ensure the success and increase the number of consumers of the products that the company would be marketing.

In a separate document, the petitioner provided the following description of the marketing manager position:

- This Department of the company is in charge of presenting the different products to the different retailers.
- He is the person in charge of evaluating and initiating the promotion and advertising campaigns necessary to present the products with the target population.
- He designs together with the General Manager the different promotions and plans or strategies directed to increasing the number of consumers of the products that the company would be marketing.
- He designs the flyers and the announcements that will be published in the different advertising medias such as newspapers, magazines and others.
- He is also responsible for evaluating together with the General Manager the results of the different campaigns.

The petitioner also provided more detailed position descriptions for the other claimed employees, and copies of its 2006 Forms W-2. The petitioner submitted its IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first two quarters of 2007. The petitioner reported only one employee in each quarter, and indicated that it paid total wages of \$31,200 and \$31,551.

The director denied the petition on January 22, 2008, concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director noted that although the petitioner claims to have five employees, its Forms 941 for the first half of 2007 indicate that the company currently has only one employee. The director further found that the petitioner's descriptions of the beneficiary's duties are too general, and do not specify exactly what the beneficiary will be doing within the context of the company's current staffing arrangement. The director concluded that the beneficiary would likely be engaged in providing sales and services to the petitioner's clients, rather than assisting in the management of the company as claimed.

On appeal, the petitioner asserts that the beneficiary's duties are "purely executive" and submits a list of 22 job duties and responsibilities to be performed by the beneficiary as "sales and marketing manager." As the job description is part of the record, it will not be repeated in its entirety here. Briefly, the petitioner distinguishes between "management" and "operative" duties, and includes a breakdown of the amount of time

the beneficiary will allocate to the listed tasks. According to the petitioner, the beneficiary will devote 70 percent of his time to operative tasks and 30 percent of his time to management tasks. The petitioner also includes “continuous” responsibilities, including understanding customer requirements, making rapid cost calculations, providing feedback on buying trends, recording sales and order information, gathering market and customer information, and acting as a contact with potential markets.

The petitioner submits copies of its IRS Form W-3, Transmittal of Wage and Tax Statements, for 2007, which shows that the petitioner paid one employee in 2007. The petitioner submitted a Form W-2 for [REDACTED], the general manager, in the amount of \$15,600. There is no evidence that the petitioner employed any other workers in 2007.

Upon review, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) 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 AAO concurs with the director that the position descriptions submitted with the initial petition and in response to the RFE were overly vague and general, and were insufficient to establish that the beneficiary would perform primarily managerial duties. The petitioner has now clarified the beneficiary’s proposed duties on appeal. However, based on the detailed position description, it is evident that the beneficiary will devote the majority of his time to non-managerial tasks related to the sales, marketing and promotion of the petitioner’s products. The petitioner has not established that the beneficiary will be employed in a managerial position, other than in position title. As noted above, the petitioner indicates that a full 70 percent of the beneficiary’s time will be devoted to “operative” duties. These tasks include negotiating with vendors to coordinate sales and deliveries, preparing market reports, regularly visiting customers, demonstrating products to potential customers, negotiating and concluding sales with customers, gathering market and customer information, visiting retail and wholesale outlets, attending trade exhibitions, checking quantities of goods in stock, making cost calculations and recording sales order information. While the beneficiary may be responsible for marketing, advertising, and promotion, and perform some duties that would be associated with a managerial position, it is evident that he would also be solely responsible for all non-managerial tasks associated with these activities, as well as the company’s day-to-day sales and delivery matters. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int’l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the petitioner has indicated that the beneficiary’s tasks are primarily operational in nature, and therefore, he can not be deemed to be employed in a qualifying managerial capacity for the purposes of this visa classification.

The petitioner indicated that the beneficiary would eventually be responsible for hiring and overseeing subordinate marketing staff 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, the evidence of record shows that the petitioner has undergone a decrease in its staffing levels, thus raising questions as to whether the company realistically intends to fully staff a marketing department. While the petitioner has consistently claimed to employ five people, it has offered no explanation as to why it can only document the employment of one worker as of the date the petition was filed. 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). Furthermore, the petitioner submitted in response to the RFE two Forms 941 showing that the company had paid in excess of \$60,000 in wages during the first two quarters of 2007. On appeal, the petitioner submits its Form W-3 and Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, indicating that the company paid total wages of \$15,600 in 2007. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. The petitioner has not established that it currently employs anyone other than a general manager. Therefore, absent evidence to the contrary, it appears that the beneficiary, as "marketing manager," would be the junior member of the company's two-person staff.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is primarily managing an essential function, the petitioner must furnish a detailed position description that clearly explains the duties to be performed in that capacity, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. If a petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). In addition, the petitioner's description of the beneficiary's daily duties must clearly demonstrate that the beneficiary primarily *manages* the function rather than *performs* the duties related to the function. As discussed, the petitioner has expressly stated that at least 70 percent of the beneficiary's time would be allotted to "operative," non-managerial tasks. The petitioner has also failed to establish that the beneficiary would serve at a senior level within the company's organizational hierarchy or with respect to the function managed. The fact that the beneficiary will be the only employee responsible for marketing, sales and promotional activities does not elevate him to the level of a function manager. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are

substantial enough to support a manager.” *Family Inc. v. U.S. Citizenship and Immigration Services*, 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company’s small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). It is the petitioner’s obligation to establish that the day-to-day non-managerial tasks of its marketing function managed are performed by someone other than the beneficiary.

Here, the petitioner has not established that it will employ or contract any workers, other than the beneficiary, to perform its day-to-day sales, marketing, and promotional tasks. The record shows that the director did take into consideration the petitioner’s overall purpose and stage of development, and properly concluded that the petitioner had not established that it has a reasonable need for a full-time manager to oversee its marketing and expansion functions. The evidence submitted on appeal, particularly the new position description and the payroll documentation for 2007, further support a conclusion that the beneficiary will perform primarily non-managerial tasks.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed by the petitioner in a primarily managerial capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the petitioner and the foreign entity have a qualifying relationship. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in pertinent part:

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

On the L Classification Supplement to Form I-129, the petitioner indicated that [REDACTED] owns 25% of the foreign entity, and 50% of the U.S. company, thus it appears that the petitioner is attempting to establish an affiliate relationship. However, the petitioner's description of the stock distribution of the companies does not meet exactly the definitions constituting a qualifying relationship between the United States entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has submitted evidence of Ms.

██████████s 25 percent interest in the foreign entity, but has not shown that she controls the foreign entity based on this minority interest. To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

The petitioner has also claimed to be a subsidiary of the foreign entity, but has failed to submit any documentary evidence of the ownership and control of the U.S. company in support of this claim. The petitioner's 2006 Form 1120, U.S. Corporation Income Tax Return, indicates at Schedule K that one foreign person or entity owns 51 percent of the petitioner's stock. The petitioner did not attach a completed Form 5472, which would have identified the foreign shareholder. Furthermore, this information is inconsistent with the petitioner's previous claim that ██████████ owns 50 percent of the U.S. entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not submitted sufficient evidence to establish that it has a qualifying relationship with the foreign entity, and for this additional reason, the petition cannot be approved.

Another issue not addressed by the director is whether the petitioner established that the beneficiary was employed by the foreign entity in a primarily managerial or executive position for at least one continuous year in the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(l)(3)(iii) and (iv).

First, there is some question as to whether the beneficiary was employed by the foreign entity for a full year. The petitioner stated in its letter dated July 24, 2007 that the beneficiary was employed by the foreign entity from January 20, 2005 until "on or about January 2006." However, the beneficiary indicated in his resume that he was employed by the foreign entity from January 2005 until December 2005. He indicates that he began working for an unrelated employer in Peru in January 2006. Therefore, the beneficiary's exact dates of employment with the foreign entity are unclear. If he was employed only from January 20, 2005 until the end of December 2005, he would be slightly short of one full year. In addition, the beneficiary's passport shows that he made at least one trip to the United States during 2005. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(A), periods spent in the United States in a lawful status for a branch of the same employer or a parent, affiliate or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad, but such periods shall not be counted toward fulfillment of that requirement. Therefore, any time the beneficiary spent in the United States during his claimed year of employment with the foreign entity cannot be counted towards his one year of qualifying employment. Based on the evidence of record, it is not clear that the beneficiary was employed by the foreign entity for the requisite time period.

Furthermore, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity. The beneficiary indicates on his resume that he held the positions of sales manager and administration manager, and he was identified on the foreign entity's organizational chart as "sales-marketing-technical support manager." However, counsel for the petitioner stated in her letter dated November 21, 2007 that the beneficiary was hired by the foreign entity as an assistant in the sales and

marketing department, and later promoted. Therefore, even if the beneficiary was employed by the foreign entity for a full year, the petitioner has failed to demonstrate that he was employed in a qualifying managerial or executive capacity for a full year. For this additional reason, the petition cannot be approved.

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that 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.

ORDER: The appeal is dismissed.