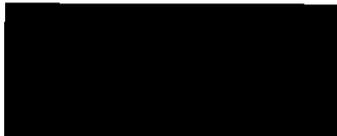


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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DATE: NOV 03 2012

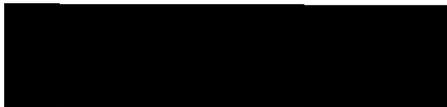
Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in the arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), specifically as a dancer and Dance Captain for Riverdance. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. See section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, the petitioner asserts that she submitted sufficient qualifying evidence under five of the ten regulatory categories. In addition, the petitioner states in her appeal brief that other dancers in similar circumstances had been approved for the I-140 petition. Considering the evidence in the aggregate, the petitioner has not established eligibility for the benefit sought by a preponderance of the evidence.

## I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. See H.R. 723 101<sup>st</sup> Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.<sup>1</sup> With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)." and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

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<sup>1</sup> Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

## II. ANALYSIS

### A. Approvals of Similar Petitions

On appeal, counsel, on behalf of the petitioner asserts that the petitioner's visa petition should be approved because previous similar petitions filed by [REDACTED] from [REDACTED] have been approved. Counsel outlines that three former Lead Dancers and one Dance Captain have received favorable adjudications on their petitions. As an initial observation, Lead Dancer and Dance Captain are distinct positions with apparent, distinct titles. More importantly, the AAO reviews appeals on a case-by-case basis. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Therefore, the AAO is not persuaded that the prior approvals mentioned in the appeal brief have any bearing on the review of the appeal that is now pending before the AAO and will determine the current appeal on whether or not the petitioner established eligibility as an alien of extraordinary abilities under the Act and implementing regulations.

### B. Evidentiary Criteria<sup>2</sup>

*Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 204.5(h)(3)(i).*

The director determined that the petitioner failed to meet this criterion. The petitioner asserts that she received numerous awards and prizes, including the [REDACTED] and [REDACTED]. The petitioner submitted photographs of various medals. In addition, the petitioner submitted articles that briefly mention or describe the [REDACTED] and [REDACTED], as well as an article that mentions the petitioner as a winner of those awards, and a letter from an Irish dance studio.<sup>3</sup>

As an initial matter, the petitioner has failed to establish that she has received the awards that she mentions pursuant to the requirements of 8 C.F.R. § 204.5(h)(3)(i). While one of the submitted photos legibly shows that the awards pictured are [REDACTED] it cannot be determined from the submitted photos whether any of the pictured awards are of the [REDACTED]. The pictured awards neither bear the petitioner's name nor has she submitted evidence from the issuing organizations indicating that the petitioner is the recipient of the claimed awards.

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<sup>2</sup> The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

<sup>3</sup> The record also contains a certificate in a foreign language with no accompanying translation. Neither counsel nor the petitioner discusses this document. Without a full certified translation pursuant to 8 C.F.R. § 103.2(b)(3), this document has no probative value.

As for the remaining documents evidencing receipt of the claimed awards, the petitioner submitted a letter from [REDACTED] the [REDACTED] [REDACTED] writes: "[REDACTED] has competed to the highest Championship Level and also in the [REDACTED] Dancing Championship over many years." Significantly, [REDACTED] merely states that the petitioner has competed at the [REDACTED] and does not indicate that she actually won the [REDACTED]. The Board of Immigration Appeals has stated that where testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborating evidence. *See Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998). The corroborating documentary evidence consists of an internet article titled [REDACTED] [REDACTED] and the petitioner's cast bio on the [REDACTED] website. Both documents indicate that the petitioner won the [REDACTED] and [REDACTED]. These webpages, however, are not contemporaneous articles reporting the results of the competition. The AAO observes that given the frequency and ease of Internet publishing in today's world, not every website could be considered a reliable, credible source of information. Moreover, the copy of the submitted article fails to show the name of the originating website or online journal.

Furthermore, the documentary evidence submitted with respect to this criterion fails to establish either the national or international recognition of the claimed prizes. Any references to the scope of recognition of the petitioner's awards are made in passing or are vague. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (stating that the truth is to be determined not by the quantity of evidence but by its quality) citing *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989). The petitioner on appeal maintains that cumulatively, the submitted documentation is sufficient to prove that the petitioner's awards and prizes are lesser nationally or internationally recognized awards for excellence in the field of endeavor. However, there is nothing in the plain language of the regulation to suggest that the requirements can be met by a "cumulative" effect of documentation that independently fails to satisfy the criterion.

Consequently, the AAO concludes that the petitioner failed to establish this criterion and affirms the director's determination.

*Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation. 8 C.F.R. § 204.5(h)(3)(iii).*

This criterion contains three evidentiary requirements the petitioner must satisfy. First, the published material must be about the petitioner and the contents must relate to the petitioner's work in the field under which she seeks classification as an immigrant. The published material must also appear in professional or major trade publications or other major media (in the plural). Professional or major trade publications are intended for experts in the field or in the industry. To qualify as major media, the publication should have significant national or international distribution and be published in a predominant national language. The final requirement is that the petitioner provide each published item's title, date, and author and if the published item is in a foreign language, the petitioner must

provide a translation that complies with the requirements found at 8 C.F.R. § 103.2(b)(3). The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The director, after considering the various forms of evidence that the petitioner submitted in support of this criterion, determined that the petitioner failed to meet the requirements of this criterion. The petitioner submitted:

1. An article from *Deseret News*
2. An article from *Davis*
3. An article from *Davis Life*
4. An article from *The Arrow*
5. An article from *Charleston Gazette*
6. An article from *Waterford News & Star*
7. An online interview from *AltDaily*
8. An article from *Irish Dancing and Culture Magazine*
9. Emails relating to petitioner's radio/TV interviews

The AAO initially observes that not all of the offered articles are actually about the petitioner. Many of the articles focus on Riverdance and they mention the petitioner tangentially or as the source of a quote for the piece. Some of the articles, however, do focus on the petitioner and therefore qualify as published material about the petitioner. Regardless, they fail to meet the requirements of the regulation on other grounds. For instance, *Irish Dancing and Culture Magazine* appears to be a professional or major trade publication and the article in that publication is about the petitioner. However, that article discusses IMD, the petitioner's Irish dance make-up business and therefore, is unrelated to the petitioner's work as a dancer or Dance Captain, the field for which classification was sought.

As for items number 1-7 in the above list, the AAO agrees with the director that the publications are not professional or trade publications and are not other "major media," pursuant to 8 C.F.R. § 204.5(h)(3)(iii). The interview in *Alt Daily* is about the petitioner. But there is no evidence of its readership in the record and the online publication's focus is on events and news occurring in and around Norfolk, Virginia. Counsel, on behalf of the petitioner, claims on appeal that *Desert News* has the largest daily circulation in the state of Utah and further states that "[i]n our opinion it is a "major" media, because it covers the whole state." Similarly, counsel states that *The Charleston Gazette* has a circulation of 57,749 on weekdays and 67,165 on Sundays and further notes that "[i]t is a very old newspaper and it covers a big territory." As for the *Waterford News & Star*, an Irish newspaper, counsel states that the city of Waterford is the 5<sup>th</sup> largest by population and that, "[i]n a small country, like Ireland, the newspaper that serves the fifth largest city in the country is "major" publication." Counsel has submitted evidence of circulation for the some of the above publications. Nonetheless, the circulation numbers for *The Charleston Gazette*, statewide readership of *Desert News*, and the focus on one city for *AltDaily* and *Waterford*, indicate that these publications are local or, at best, regional in scope. The AAO is not persuaded that these publications that have a local or regional scope constitute "major media" as contemplated by the regulation.

Finally, petitioner submitted emails showing that she was contacted for various radio or television interviews. On appeal, counsel, on behalf of petitioner, asserts that the emails are “comparable evidence” as allowed by the USCIS Policy Memorandum PM-602-0005.1, dated December 22, 2010. Counsel’s assertion is a mischaracterization. The referenced memorandum merely reiterates the legal standard as set forth in 8 C.F.R. § 204.5(h)(4) which states: “If the standards do not readily apply to the beneficiary’s occupation, the petitioner may submit comparable evidence to establish the beneficiary’s eligibility.” The petitioner in this instance has failed to explain why the standards outlined in subsections (i)-(x) of 8 C.F.R. § 204.5(h)(3) would not readily apply to her occupation. The regulations do not allow “comparable evidence” simply to supplement a visa petition that otherwise fails to establish eligibility with substantial documentation. Moreover, a close review of the emails shows that the various interviews are broadcast on local TV and radio stations. The local or regional scope disqualifies the interviews as “major media.” Nonetheless, the AAO will consider the emails below as evidence of the petitioner’s leading or critical role with Riverdance.

For all the reasons discussed above, the AAO affirms the director’s finding and concludes that the petitioner failed to satisfy the regulatory language for this criterion.

*Evidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iv).*

The petitioner submitted two documents that are relevant to the discussion of this regulatory criterion. The documents are both letters from [REDACTED] and are virtually identical. The first letter is dated March 30, 2010, and was submitted along with the petitioner’s I-140 application, which was filed on December 22, 2011. In that letter, in relevant part, [REDACTED] writes:

To be a Dance Captain is not an easy task as one has not only to lead by example but one also has to be prepared to make tough calls in terms of casting and in matters of discipline, and of course all of this is amongst one’s peers and friends.

The second, nearly identical letter is dated January 23, 2012, and shows minor alterations to the above quoted paragraph. That letter was submitted along with the response to the director’s request for evidence. In the corresponding paragraph in the January 23, 2012 letter, [REDACTED] writes:

To be a Dance Captain is not an easy task as one has not only to lead by example but one also has to be prepared to make tough calls in terms of casting and in matters of discipline, and of course all of this is amongst one’s peers and friends. As producer of Riverdance I rely heavily on [the petitioner], not just for the daily maintenance of the show but also for running ongoing auditions for new dancers. I trust [the petitioner]’s judgment completely and she has been crucial in ensuring that Riverdance only engages dancers of the highest quality.

The petitioner did not claim that she was a judge of others in the original statement submitted along with her I-140 Form. The respondent subsequently makes the claim that she is a judge for the first time in the RFE response, dated March 6, 2012, and the relevant substantive adjustments highlighted above provides minimal supporting evidence to base the new claim.

Furthermore, the fact that the petitioner engaged in “running ongoing auditions for dancers” is insufficient to show that the petitioner actually participated in judging other dancers. Running auditions could merely involve assisting with logistical processes. The regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires evidence that the beneficiary has served as “a judge” of the work of others. The phrase “a judge” implies a formal designation in a judging capacity, either on a panel or individually as specified at 8 C.F.R. § 204.5(h)(3)(iv). The regulation cannot be read to include every informal instance of colleagues requesting input on decisions for which they bear responsibility. The Julian Erskine letter, the only document submitted to evince the petitioner’s satisfaction of the regulatory requirements under 8 C.F.R. § 204.5(h)(3)(iv), is too ambiguous to serve as probative evidence that the petitioner functioned as a judge in her role as Dance Captain for Riverdance.

As the petitioner has not established that she served as “a” judge, the AAO concludes that the petitioner failed to satisfy this criterion.

*Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases. 8 C.F.R. § 204.5(h)(3)(vii).*

The director found that the petitioner failed to establish this criterion. The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is limited to the visual arts is longstanding and has been upheld by a federal district court. *See Negro-Plumpe*, 2:07-CV-820-ECR-RJJ at \*7 (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). The alien’s work also must have been displayed at an artistic exhibitions or showcases (in the plural).

As the petitioner is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, and is instead a performer, specifically a dance captain, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii). Consequently, the AAO finds that the petitioner failed to satisfy this criterion.

*Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii).*

The director determined that the petitioner failed to establish that she performed in a leading or critical role for organizations that have a distinguished reputation. On appeal, counsel, on behalf of the petitioner, asserts that [REDACTED] is an organization with a distinguished reputation and that as the [REDACTED] the petitioner performed in a leading or critical role. The AAO, as an initial matter, agrees that there is sufficient documentation to establish that [REDACTED] is an organization with a distinguished reputation.

In describing the petitioner's capacity and effectiveness as the Dance Captain, in the March 30, 2010 letter [REDACTED] writes:

To be a Dance Captain is not an easy task as one has not only to lead by example but one also has to be prepared to make tough calls in terms of casting and in matters of discipline, and of course all of this is amongst one's peers and friends.

[The petitioner] has shown herself to be mature and extremely professional in carrying out her duties as Dance Captain and has earned the respect of the dancers and of her managers equally, and no more so than earlier this month when she had to have the show ready for presentation in the world famous Radio City Music Hall in New York City.

[REDACTED] Production Stage Manager of Riverdance, provides additional details regarding the job of Dance Captain, which aid in establishing that a Dance Captain serves in a leading or critical role for the company. [REDACTED] writes:

[The petitioner's] duties as [D]ance [C]aptain are to maintain the technical and artistic integrity of the Irish dance elements in the show. [The petitioner] maintains the original choreography of the show, giving notes on a daily basis. Her teaching skills are often called upon when a new performer joins the company, having to train and successfully integrate them into the show. She has taught the Principal Female Dancer role to many of our dancers . . . . We recently celebrated our 15<sup>th</sup> Anniversary with performances at Radio City Music Hall in New York. [The petitioner] was integral to the success of these performances as she was entrusted to rework each dance to accommodate more dancers and a larger performing space.

The above letters demonstrate that the petitioner's role as Dance Captain is a leading or critical role. The emails showing that [REDACTED] relies on the petitioner to promote Riverdance on local TV and radio stations further substantiate the importance of the petitioner's role. Based on all of the above discussion, the AAO finds that the petitioner served in a leading or critical role for Riverdance, an organization with a distinguished reputation.

Regardless, the AAO further determines that the petitioner has failed to fully meet the requirements under the regulation. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence of "organizations" or "establishments" in the plural, which is consistent with the statutory requirement for extensive evidence. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. While [REDACTED], Rhythm of the Dance Producer for the National Dance Company of Ireland, and [REDACTED], President of Kerry Records, provided letters attesting to the petitioner's leading role in their respective organizations, both letters use conclusory language and fail to specify how the petitioner served in a critical or leading role. *See 1756, Inc. v. The Attorney General*

*of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990) (noting that USCIS need not accept primarily conclusory assertions). Moreover, there is insufficient evidence to establish that either of the organizations that are associated with the two letters is an organization that has a distinguished reputation.

Therefore, the AAO must conclude that the petitioner has failed to satisfy the plain language requirements of 8 C.F.R. § 204.5(h)(3)(viii).

### C. Summary

The petitioner has failed to submit sufficient relevant, probative evidence to satisfy the regulatory requirement of three types of evidence.

### III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.<sup>4</sup> Rather, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.* at 1122.

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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<sup>4</sup> The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOI*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I-&-N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.