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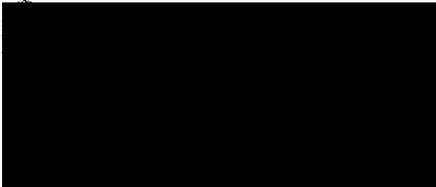
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FILE: WAC 01 153 52141 Office: CALIFORNIA SERVICE CENTER Date: AUG 31 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based petition. On appeal, the Administrative Appeals Office (AAO) remanded the matter to the director for the entry of a new decision. Upon review of the record, including additionally requested evidence, the director again denied the employment-based petition. The AAO summarily dismissed a subsequently filed appeal, noting that the record did not contain a supplemental brief or further evidence. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted in order to consider the evidence submitted on appeal and the director's decision will be affirmed.

The petitioner is a corporation organized in the State of California in May 1997. It imports and wholesales headwear. It seeks to employ the beneficiary as its vice-president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The petition was filed March 27, 2001. On September 25, 2001, the director requested further evidence and the petitioner provided its response December 17, 2001. The director denied the petition on March 21, 2002. The AAO remanded the matter on April 18, 2003 noting that the director had not considered the petitioner's claim that the beneficiary would be employed in an executive capacity and misstating the petitioner's number of employees. Upon remand, the director requested further evidence on June 27, 2003 and the petitioner provided its response on August 12, 2003. On September 15, 2003 the director denied the petition, determining that the petitioner had not established: (1) a qualifying relationship between the petitioner and the foreign entity; or (2) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner. The petitioner submitted a Form I-290B, Notice of Appeal and indicated that a supplemental brief or evidence would be submitted within 30 days. The AAO summarily dismissed the appeal on November 23, 2004 noting that the record did not contain either a supplemental brief or evidence. On motion, counsel for the petitioner provides evidence that an appeal brief was timely filed. As such, the motion to reopen will be granted and the appeal will be considered.

On appeal, counsel for the petitioner asserts that: (1) the beneficiary satisfies the criteria for a manager or an executive and (2) the beneficiary's foreign employer owns and controls a majority interest in the U.S. corporation or in the alternative the same individual owns and controls a majority interest in both the U.S. petitioner and the beneficiary's foreign employer. Counsel also cites unpublished decisions in support of his assertions.

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

- (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):

\* \* \*

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding

the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue to be considered in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

The petitioner has presented evidence to establish that the majority owner of the foreign entity purchased a majority interest in the U.S. petitioner in May 1997. At that point the petitioner and the foreign entity enjoyed an affiliate relationship. The record also contains evidence that the majority owner subsequently transferred a portion of his interest in the U.S. petitioner to the foreign entity, sufficient for the foreign entity to own and control the U.S. petitioner in a parent-subsidiary relationship. Although the record does not contain evidence of any monetary consideration paid by the foreign entity to the former majority owner, upon review of the totality of the evidence in the record, the petitioner has established a qualifying parent-subsidiary relationship.

The second issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

On the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated that the beneficiary would "perform executive duties" and the petitioner noted that it employed 12 individuals. On September 25, 2001 the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested among other things: a more detailed description of the beneficiary's duties; a list of specific discretionary decisions that the beneficiary had exercised in the last six months; a specific day-to-day description of the duties the beneficiary had performed over the last six months; and an organizational chart describing the petitioner's managerial hierarchy and staffing levels and listing all employees under the beneficiary's supervision by name, job title, and brief description of their job duties, educational levels and annual salaries.

In a December 14, 2001 response, counsel for the petitioner indicated that the beneficiary had "established the company business plan, established methods for interdepartmental coordination, established budget and allocate operational costs between departments" and "decided on final design of computer system for marketing department, implemented new in-house training program for employees, put new quality control system into effect." Counsel also indicated that the beneficiary "will meet with department heads on daily basis, review progress toward operational goals, handle personnel issues concerning performance, [sic] and training, review and make necessary amendments to expansion plan, communicate with parent company, communicate with clients/customers."

Counsel further listed the beneficiary's duties as:

The beneficiary is in charge of the day-to-day operations of the company. She also is charged with the development and implementation of general policies and systems concerning operations, finance and personnel management. The beneficiary is also charged with reporting to and interfacing with the parent company. The percentage of time spent in each area varies on a daily basis depending on current needs. The beneficiary's experience with the parent company in marketing, product and client development are the key factors in equipping her for the present position.

The beneficiary will be employed in the capacity of Vice President in the U.S. entity in charge of the day-to-day operation and management of the company. To be more specific, the alien will perform the following duties: formulate and enforce general policies, develop and implement operational, financial, and personnel management system, recruit, train, direct, and supervise employees, set up company business objective and business plan, direct and coordinate different departments' activities, report company's progress and financial position to the parent company on tegular [sic] basis.

As the Vice President, the beneficiary will exercise discretionary authority over company's financial matters such as budget, operational cost, fund management, etc. She will also be vested with power to handle personnel matters such as hiring and firing, evaluation, promotion, etc. The beneficiary will be chief executive officer of the company stationed in the U.S., accountable only to the board of directors of U.S. and the parent company.

Counsel continued the description by reciting portions of the definition of executive capacity and indicating that the beneficiary would "participate in the planing [sic] and designing of computer system to tailor the needs of the U.S. entity," "plan and design in-house training regarding knowledge of the products and services," "plan new ways of operation regarding quality control and sales methods," and "plan the expansion of the market."

The petitioner also provided its organizational chart showing the beneficiary in the position of vice-president over the accounting, sales, and warehouse departments. The accounting department consisted of a cashier position and a bookkeeper position. The sales department contained a sales manager over a salesperson and

two customer service representatives. The warehouse department consisted of two warehouse "supervisors" and two warehouse employees.

The director denied the petition determining that the beneficiary supervised a salesperson, two customer service representatives, and a sales manager. The director observed that the petitioner had not provided a description of these individuals' duties. The director noted that the beneficiary's subordinates were not professional employees. The director concluded that the beneficiary must be a first-line supervisor.

On appeal, counsel for the petitioner pointed out the director's mistake of fact regarding the number of the beneficiary's subordinates and asserted that the beneficiary would be performing in the capacity of an executive for the U.S. entity. The AAO remanded the matter to the director for a more thorough analysis and entry of a new decision.

On June 27, 2003, the director again requested further evidence on the beneficiary's managerial or executive capacity. The director requested: a more detailed description of the beneficiary's duties in the United States including a typical day description; the petitioner's organizational chart as of the date of filing the petition, March 27, 2001, describing the petitioner's managerial hierarchy and staffing levels and listing all employees under the beneficiary's supervision by name, job title, education level, and a brief description of their job duties; and the petitioner's California Forms DE-6, Employer's Quarterly Wage Report for 2001.

In an August 12, 2003 response counsel for the petitioner asserted that the beneficiary would be employed in both a managerial and an executive capacity. Counsel noted that the beneficiary had eleven people working under her; was in charge of the accounting, sales, and warehouse departments; and in charge of decision-making for the company's planning. The petitioner provided a list of the beneficiary's typical daily duties which included: reviewing overnight messages, returning important clients' messages and electronic mail; studying previous day's sales and accounting reports; meeting with the sales manager; inspecting the warehouse and reviewing reasons and quantity of returned products and examining quality and number of defective products; reviewing order sheets, contacting clients to discuss pricing, deadlines, schedules for factory orders, and arranging shipping dates; meetings with the accounting department to review inventory report and compare sales date, determine redelivery list from the warehousing department, reviewing credit inquiries; analyzing monthly profits/loss, reviewing accounts payable, returning phone calls and electronic mail to Taiwan.

The petitioner also included the beneficiary's resume that listed the beneficiary's duties as vice-president/managing director for the petitioner as:

- Direct the management of the marketing department of the U.S. entity
- Establish the goals and policies of the marketing department
- Participate in the planning and designing of computer system
- Plan and design in-house training regarding knowledge of the products and service
- Plan new ways of operation regarding quality control and sales methods
- Plan the expansion of the market
- Responsible to hire, fire, promotion, leave authorization and other personnel actions

- Report to and communicate with the parent company

The petitioner further included brief job descriptions for the beneficiary's subordinates. The petitioner indicated that the sales representatives located new clients, participated in trade shows, and settled problems incurred by clients. The customer service representatives answered phone calls, arranged and managed merchandise orders, returns, invoices, and delivery of products, mailed invoices and catalogs, and participated in trade shows. The accounts receivable clerk handled collections, checking references, receiving purchase orders and inventory and financial reports. The accounts payable clerk controlled cash flow, ordered office supplies, handled daily receipts, payments, and bank account reports, and reconciled bank accounts and inventories at the end of the month. The warehouse personnel handled inflow and outflow of goods, packaging, maintaining the warehouse, managing samples, and assisted in auditing the quantity of storage of goods.

The petitioner submitted its 2001 organizational chart showing the beneficiary supervising the accounting, sales and warehouse departments. The chart differed from the initial chart submitted in that the employees in each department reported directly to the beneficiary with no intervening tiers of management. The petitioner also provided its California Forms DE-6 for the first quarter of 2001, the quarter in which the petition was filed, to confirm the employment of the beneficiary's subordinates. The subordinates' salaries depicted on the California Form DE-6 reflected that the petitioner employed one salesperson, the accounts receivable clerk, the accounts payable clerk, and two warehouse employees full-time. The California Form DE-6 reflected that a second salesperson, two warehouse employees, and the two-customer service representatives were employed part-time.

On September 15, 2003, the director denied the petition determining that the petitioner's job description of the beneficiary's duties did not establish that the beneficiary fulfilled the criteria set out in the definition of executive capacity. The director suggested that the job description was more indicative of an individual performing tasks to provide a service or product. The director also noted that it was reasonable to believe that with the petitioner's organizational structure, the beneficiary would assist with day-to-day non-supervisory duties and the performance of menial tasks precluded the beneficiary from being considered an executive. The director also determined that the beneficiary would not qualify as a manager because the position of vice-president was in essence a first-line managerial position over non-managerial and non-professional employees. The director further determined that the petitioner had not demonstrated that the beneficiary was a function manager.

On appeal, counsel asserts: that the director did not explain the menial tasks that precluded consideration of the beneficiary as an executive; that the beneficiary directs and manages the essential components of sales, marketing, accounting, and warehousing; and that the director did not consider the reasonable needs of the petitioner in light of its developmental stage but based the decision on staffing levels. Counsel also contends: that the beneficiary is primarily an executive and is secondarily a function manager. Counsel takes issue with the director's determination that the petitioner must show that the beneficiary manages or directs a function rather than directly performing the function and avers this determination is arbitrary and capricious when considering the petitioner's developmental stage. Counsel also notes that the director did not offer a citation in support of this rule. Counsel cites several unpublished decisions in support of his assertions.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Counsel for the petitioner asserts that the beneficiary qualifies as both a manager under section 101(a)(44)(A) of the Act, and an executive under section 101(a)(44)(B) of the Act. However, a petitioner may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The AAO observes the disparate view the beneficiary and counsel have of the beneficiary's actual duties. The beneficiary's resume indicates the beneficiary is involved in marketing the petitioner's product. The petitioner does not provide evidence that it employs individuals other than the beneficiary to perform the petitioner's market research. The petitioner and the beneficiary both reference the beneficiary's participation and design of the petitioner's computer system apparently for the marketing department.<sup>1</sup> The beneficiary also lists her responsibilities for planning in-house training, sales methods, and quality control. However, it is not possible to determine from this description whether the beneficiary is performing the duties of a supervisor or whether these duties involve primarily executive tasks. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Upon review of the petitioner's description of the beneficiary's typical daily duties, the beneficiary spends time dealing with clients on pricing, deadlines, scheduling orders and shipping, on tasks associated with the quality of the petitioner's product, studying reports, analyzing profit and loss statements, and communicating with the petitioner's overseas supplier. The petitioner has provided a list of the beneficiary's daily duties that includes a mix of operational, administrative, and supervisory duties, as well as duties that could be considered executive. However, it is not possible to determine from the descriptions provided whether the beneficiary's duties comprise primarily executive duties or whether the beneficiary's variety of tasks involves performing primarily the day-to-day tasks associated with providing the petitioner's basic operational services. Upon review of all the descriptions proffered, the AAO cannot conclude that the petitioner has established that the beneficiary *primarily* performs the specified responsibilities listed in the definitions of executive or managerial capacity rather than spending the majority of her time on day-to-day functions.

The AAO acknowledges that the director did not list the "menial tasks" that precluded the beneficiary's qualification as an executive and withdraws this conclusory statement from the decision. The AAO observes that the deficiency in the petitioner's evidence is not that the description of the beneficiary's duties described

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<sup>1</sup> See counsel's December 14, 2001 response to the director's request for evidence on the beneficiary's managerial or executive capacity.

"menial tasks," but rather that the description does not contain sufficient information to show that the beneficiary's duties are primarily the duties specified in the definitions.

Counsel's assertion that the beneficiary is, secondarily, a function manager is also not persuasive. 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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604).

In this matter, counsel asserts that the beneficiary directs and manages the essential components of marketing, accounting, sales, and warehousing. The petitioner has provided evidence that it employed five full-time employees and five part-time employees subordinate to the beneficiary's position. However, neither counsel nor the petitioner has sufficiently distinguished the beneficiary's role in the marketing, sales, accounting, and warehousing departments from that of a first-line supervisor. First as referenced above, the petitioner has not indicated it has employees in a marketing department; thus, if the beneficiary is in charge of the marketing component, the beneficiary necessarily would be the individual responsible for providing the marketing service. Second, the record indicates that the beneficiary is responsible for hiring, firing, promotion, taking personnel actions, recruiting, training, and supervising employees. These are the duties of an individual in a supervisory role. Based on the petitioner's organizational chart and the description of the beneficiary's duties, the beneficiary is the individual responsible for supervising the employees in the accounting, sales, and warehousing departments. The AAO declines to expand the parameters of managing or directing an essential function to include supervising the employees in a particular department. Supervising employees in a department does not equate to managing the department as an essential function. The petitioner has not provided evidence that the beneficiary manages an essential function.

Performing non-qualifying tasks, such as first-line supervisory duties of non-professional employees or duties necessary to produce a product or service, will not automatically disqualify the beneficiary from this visa classification as long as those tasks are not the majority of the beneficiary's duties. However, again we note that the petitioner has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial. The petitioner has not provided sufficient evidence to establish that the beneficiary will perform primarily managerial duties. 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)).

Counsel correctly observes that section 101(a)(44)(C) of the Act, requires that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, to establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, counsel argues that the petitioner should not be punished because it operates a "lean" company and is still able to generate million dollars in sales. However, counsel has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of marketing and first-line supervising duties when the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).<sup>2</sup>

Counsel's citation to unpublished decisions is not probative. Counsel does not provide evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

The record does not establish that the beneficiary's position in the petitioner's organization would have been primarily executive or managerial when the petition was filed. The record does not establish that the beneficiary would have been relieved from performing non-qualifying duties such as marketing and first-line supervisory duties of the petitioner's sales, warehousing, and accounting personnel. The petitioner has not overcome the director's determination that the beneficiary's position would not be primarily managerial or executive.

Beyond the decision of the director, the petitioner has not established that the beneficiary's duties for the foreign entity were primarily managerial or executive. Counsel for the petitioner indicates that the beneficiary's duties for the foreign entity focused on new product research and new client research, and that she developed methods of identifying, implementing, and marketing new product concepts and developed the program for new client interface through multi-media and on-site presentation. Counsel indicates that the beneficiary spent 40 percent of her time on new product research and 40 percent of her time on new client research. The foreign entity's organizational chart shows that the beneficiary had four subordinate employees under her supervision. The description of the beneficiary's duties for the foreign entity and the foreign entity's organizational chart are not sufficient to establish that the beneficiary's duties were primarily managerial or executive. The record suggests that the beneficiary was a first-line supervisor for the foreign entity's marketing department. The record does not contain evidence that the beneficiary's subordinates held professional positions. A managerial or executive employee must have authority over day-to-day operations

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<sup>2</sup> The AAO acknowledges counsel's claim that the beneficiary functions more as a president than a vice-president. However, this claim is apparently based on later developments within the organization when the beneficiary's superior, the petitioner's president, left the U.S. organization.

beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. at 604. 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)). For this additional reason, the petition will not 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 for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 decision of the director dated September 15, 2003 is affirmed.