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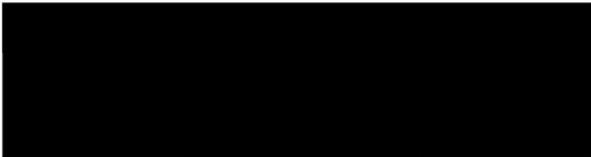
U.S. Department of Homeland Security  
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Washington, DC 20529-2090



U.S. Citizenship  
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Services

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FILE: [REDACTED]  
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OFFICE: NEBRASKA SERVICE CENTER

Date: FEB 02 2009

IN RE: Petitioner:  
Beneficiary:



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: SELF-REPRESENTED

**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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was organized in the state of Florida as a business that offers language-based education programs. The petitioner seeks to employ the beneficiary as its owner and language director. 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 director denied the petition on the following independent grounds of ineligibility: 1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 2) the petitioner failed to establish that it has a qualifying relationship with the foreign entity that employed the beneficiary abroad.

On appeal, the petitioner disputes both grounds of denial and submits a brief statement in support of the appeal.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 which 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.

The first issue in this proceeding is whether the petitioner would employ the beneficiary in a capacity that is managerial or executive.

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.

In support of the Form I-140, the petitioner submitted a letter dated March 15, 2007 stating that the nature of its business is to teach various foreign languages to corporate personnel and to assist

students in their preparation for taking various standardized college entry exams. The beneficiary, on behalf of the petitioner, stated that his proposed duties would include administering agreements and contracts, instructing the petitioner's teachers, and providing instruction in the area of educational marketing. The beneficiary stated that this list of duties is not exhaustive, but did not provide any further description of his proposed position with the U.S. entity.

On August 10, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, a detailed description of the beneficiary's proposed employment, listing the beneficiary's specific job duties and the types of employees he would supervise. The petitioner was also asked to provide its organizational chart showing the beneficiary's position with respect to other employees in the organization. Lastly, the petitioner was asked to provide W-2 statements issued to any employees from 2004 through 2006.

In response, the beneficiary provided the following description of his proposed employment:

I prepare general and tailored [sic] made programs according to the needs of the corporations, [sic] we contract with in the U[.]S[.] and Spanish [c]ourses in Argentina. I recruit students to study here in the U[.]S[.] and overseas especially Spanish in our branch located in Buenos Aires[,] Argentina. I also prepare the examinations corresponding to each level in the 3 languages we offer . . . . I coordinate group activities and classes at [the petitioning entity] and at different corporations we hold contracts with. I design the marketing plan using newspapers, magazines, and mailings. Furthermore, I research new materials for use in our courses. I write articles about different aspects of the languages we instruct for specialized language journals. I also make contracts and agreements with different entities around the world, incorporating new courses for the potential students in the U[.]S[.], widening their educational experience day by day. I organize all type[s] of activities for the students such as field trips especially for the students coming to study English . . . . I assist in finding accommodations for their stay. Furthermore, I prepare programs for other [l]anguage [s]chools who require our services. I administer International Language Examinations. I hire qualified personnel and faculty . . . . They are trained by me so as to keep the same methodology and standards . . . . After their training, I evaluate them to realize their capability to fulfill our requirements . . . . I also grade them and remark [on] their weak points . . . . I regularly supervise their classes . . . .

The petitioner did not provide the requested organizational chart. Rather, a job description was provided for the position of a language instructor. It is noted that all the tasks listed in the job description are referenced in first person, similar to the job description for the beneficiary's proposed position. Although the job description contains no signature from an authorized representative of the petitioner, it appears likely that the beneficiary performs the duties assigned to the language instructor in addition to the duties assigned to him in his proposed position as language director. The job duties of the language instructor include teaching students a given language, administering examinations, and assessing students' knowledge of the various languages taught to them.

It is noted that instead of providing the W-2 statements as requested in the RFE, the petitioner provided its corporate tax returns from 2003-2006.

On November 8, 2007, the director denied the petition, concluding that the beneficiary would primarily perform the petitioner's daily operational tasks rather than focusing primarily on managerial or executive-level duties. The director also noted the petitioner's failure to submit requested evidence. The AAO notes, however, that the director's overly broad statement does not accurately reflect the record of proceeding, which shows that the petitioner did comply with significant portions of the RFE. Specifically, the record shows that the petitioner submitted a description of the beneficiary's proposed position as well as the position of one other employee, whose identity was not made clear. This information was requested in the RFE, and the petitioner clearly complied with that portion of the request. Although the director's observation did not serve as the basis for denial, the AAO will nevertheless withdraw the comment, as it does not reflect the record as presently constituted.

That being said, the petitioner failed to comply with the director's request for an organizational chart and the W-2 wage and tax statements issued by the petitioner from 2004-2006. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). While the AAO acknowledges the petitioner's submission of its corporate tax returns from 2003-2006, this was not the requested documentation. The director specifically requested the petitioner's W-2s, most-likely for the purpose of ascertaining the size of the petitioner's support staff. The requested documentation was not provided. The AAO notes, however, that the petitioner's corporate tax returns indicate that the petitioner did not pay any wages or salaries during any of its years of operation prior to the date the Form I-140 was filed. As the petitioner has not provided an organizational chart, the AAO is unclear as to whether anyone other than possibly the beneficiary is providing services for the petitioner.

On appeal, the beneficiary, on the petitioner's behalf, argues that the RFE response satisfied the issues that were previously raised in the director's notice. However, as discussed above, the petitioner responded to only a portion of the director's request and failed to provide crucial documents that are necessary to gauge the availability of a support staff and, consequently, the petitioner's ability to relieve the beneficiary from having to primarily perform the non-qualifying, daily operational tasks.

In summary, the record shows an entity represented and operated by the beneficiary. The beneficiary appears to not only manage the company, but also to carry out all or a majority of the underlying operational tasks that are directly related to providing the services sold to the petitioner's clientele. It is noted that 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the present matter, it appears that the beneficiary markets the petitioner's services, sells these services, and ultimately provides these services to the end user. While the beneficiary, as owner and top-level manager of the petitioning entity, may be vested with discretionary authority over most matters concerning the petitioner's business, the primary portion of his time would unlikely be spent performing duties within a

managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for immigrant classification as an employee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. As previously discussed, the record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. Therefore, the petition may not be approved on this initial basis.

The other issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) 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;

\* \* \*

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the present matter, the beneficiary, in his initial support letter submitted on behalf of the petitioner, stated that he is the owner of the petitioning entity. It is noted that no mention was made as to who owns and controls the foreign entity, nor did the petitioner provide documentation to establish that the beneficiary in fact owns the U.S. entity as claimed.

Accordingly, the director addressed this deficiency in the RFE by instructing the petitioner to provide documentation to establish that the U.S. entity and the beneficiary's foreign employer are commonly owned and controlled.

In response, the petitioner provided a foreign document and its translation establishing that the beneficiary is the owner of the foreign entity. While the petitioner had previously provided, and subsequently resubmitted, a copy of its articles of incorporation, this document does not establish the company's ownership and control. The petitioner also provided copies of its corporate tax returns, including Schedule K, where item 5 shows that the petitioner is 100% owned by an individual,

partnership, corporation, estate or trust. However, the petitioner did not provide the corresponding Statement 5, which was intended to elaborate on the details of the petitioner's ownership. Despite the beneficiary's insistence that the petitioner fully responded to the director's RFE, the record has not been supplemented with any documentation to support the claim that the petitioning entity is owned and controlled by the beneficiary. As stated previously, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Furthermore, 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 regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. In the present matter, the petitioner has failed to establish that it and the beneficiary's employer abroad have common ownership and control. Therefore, based on this second ground for ineligibility, this petition cannot be approved.

That being said, if the petitioner were to provide sufficient documentation establishing the beneficiary as owner of the foreign and U.S. entities as claimed, questions would then arise as to whether the beneficiary will be an "employee" of the United States operation. As explained in 8 C.F.R. § 204.5(j)(5), the petitioner must establish that the beneficiary will be "employed" in an executive or managerial capacity. It is noted that "employer," "employee," and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing the multinational executive and managerial immigrant classification. Section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C), requires beneficiaries to have been "employed" abroad and to render services to the same "employer" in the United States. Further, section 101(a)(44), 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. Finally, the specific definition of "managerial capacity" in section 101(a)(44)(A), 8 U.S.C. § 1101(a)(44)(A), refers repeatedly to the supervision and control of other "employees." Neither the legacy Immigration and Naturalization Service nor CIS has defined the terms "employee," "employer," or "employed" by regulation for purposes of the multinational executive and managerial immigration classification. See, e.g., 8 C.F.R. § 204.5 and 8 C.F.R. § 214.2(l). Therefore, for purposes of this immigrant classification, these terms are undefined.

The Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as

follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Darden*, 503 U.S. at 323-324; see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

Within the context of immigrant petitions seeking to classify the beneficiary as a multinational manager or executive, when a worker is also a partner, officer, member of a board of directors, or a major shareholder, the worker may only be defined as an "employee" if he or she is subject to the organization's "control." See *Clackamas*, 538 U.S. at 449-450; see also *New Compliance Manual* at § 2-III(A)(1)(d). Factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

*Clackamas*, 538 U.S. at 449-450 (citing *New Compliance Manual*).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that the beneficiary will be an "employee" employed in a managerial or executive capacity. As explained above, the petitioner is a corporation, which the petitioner claims is ultimately owned and controlled

by the beneficiary, who purports to assume a role as the petitioner's principal. While the petitioner's organizational chart names another officer within its hierarchy, there is no evidence that this individual has an ownership interest or is in a position to exercise any control over the work to be performed by the beneficiary.

In view of the above, if the petitioner established the beneficiary as the owner of both entities, it follows that the beneficiary will then be a proprietor of this business and will not be an "employee" as defined above. It has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. To the contrary, the beneficiary *is* the petitioner for all practical purposes. He will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his work; and he will share in all profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that the beneficiary will be "employed" as an "employee," and the petition may not be approved for this additional reason.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during his employment abroad as well as the foreign entity's organizational chart. However, the petitioner failed to provide the requested information; nor did the petitioner provide any information regarding this issue when the Form I-140 was initially submitted. Therefore, the petitioner has failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Second, the record does not establish that the petitioner is a multinational entity. The regulation at 8 C.F.R. § 204.5(j)(2) defines the term *multinational* as the qualifying entity, or its affiliate, or subsidiary that conducts business in two or more countries, one of which is the United States. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." Although the director provided documentation to show that the foreign entity was doing business from 2001-2003, there is no documentation to show that the foreign entity continued to do business at the time the petition was filed or that it is currently doing business. Therefore, the record does not show that the petitioner is a multinational entity.

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). Accordingly, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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, *aff'd*, 345 F.3d 683.

As a final note, counsel makes a brief reference to the petitioner's current approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by U.S. Citizenship and Immigration Services (USCIS) than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In addition, as noted by the director, because USCIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29-30 (D.D.C. 2003) (recognizing that CIS approves some petitions in error).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. 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. 1988). It would be absurd to suggest that CIS 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).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the

contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.