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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 02 241 53183

Office: TEXAS SERVICE CENTER

Date:

SEP 03 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:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Gfissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation incorporated in the State of Florida that claims to be engaged in the export and import of diesel injection and tractor parts. It seeks to employ the beneficiary as the president, treasure and director of its U.S. operations. 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, concluding that the petitioner had not established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity. The director further found that the petitioner has failed to establish that it had been doing business for one year prior to the filing of the immigrant petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contends that the director's decision is in error. Counsel asserts that the beneficiary will be employed by the U.S. entity in a managerial capacity, and that the petitioner has been doing business since its inception in 1999. Counsel submits additional evidence on appeal to support these 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 in the present matter is whether the beneficiary will be employed in a primarily managerial or executive capacity by 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.

The petitioner filed the Form I-140, Immigration Petition for Alien Worker, on August 7, 2002. No supplemental evidence was submitted at that time.

On January 22, 2003, the director issued a request for further evidence (RFE), in which he instructed the petitioner to submit evidence of the staffing level in the United States, including the position titles, duties, and educational levels of all employees. The director also requested Internal Revenue Service (IRS) Forms W-2 for the year 2002 for all employees, a copy of the petitioner's corporate tax return for 2002, and a copy of IRS Form 941, Employer's Quarterly Federal Tax Return, for each quarter in 2002.

In response, the petitioner submitted an organizational chart showing that the U.S. company's staff consisted of the beneficiary as president, treasurer and director; an individual serving as vice president, secretary, and director; an administrative manager; and a marketing employee. The petitioner only submitted Forms W-2 and job descriptions for the beneficiary, the vice president, and the administrative manager. It is also noted that on the Form I-140 the petitioner indicated that it has 3 persons on staff. The description of the beneficiary's job duties in the U.S. company includes:

The daily monitoring of the financial aspects of the [U.S. company].

The implementation and enforcement of budgetary guidelines for the expansion of the [U.S. company] in its aim to wholesale USA manufactured diesel injection and tractor parts. . . . This duty includes travel within the United States to meet with suppliers to expand the line of U.S. manufactured parts currently being sold overseas and locally.

- The planning of the daily activities of [the U.S. company], both in the banking realm and the delivery and export division.
Administrative management of the sales staff.
- Review on a daily and weekly basis the financial reports and supporting documents with relation to the progress and continued success of the forecasted sales achievement objectives of the company.

The petitioner also indicated that as chief executive officer of the petitioner's international group, the beneficiary's duties include:

- Planning, implementation, control and performance of the general strategies for the international business objectives.

- The monitoring via phone and computer communication systems of the progress and management of the production, manufacturing status report, and inventory levels to meet future shipment needs to both the USA and foreign corporations.

On March 31, 2003, the director issued a second RFE. With respect to the beneficiary's position in the United States, the director requested a statement describing the proposed job duties of the beneficiary, including position title, all duties, and percentage of time spent on each duty. The petitioner was also asked to disclose the number of subordinate manager/supervisors or other employees reporting directly to the beneficiary, along with a brief description of their job titles, duties and educational levels.

In a letter dated April 25, 2003, the petitioner provided the following description of the beneficiary's job duties in the United States:

As President, Treasurer and Director of [the U.S. company], his duties include:

- The daily monitoring of the financial aspects of the [U.S. company]. He will continue to be fully responsible of the financial viability of [the U.S. company], including directing the auditing of accounts to insure compliance with established standard procedures and practices.
- He will continue to be responsible for directing and coordinating the activities of managerial personnel, which are involved in the performance of internal operations of the business, included [sic] the managerial personnel of the Multinational Group. Also, he will continue to be responsible for hiring the necessary personnel of the company.
- He will be responsible for reviewing on a daily and weekly basis the activity reports and financial statements to determine the company's progress and the success of the commercial operation.
- The implementation and enforcement of budgetary guidelines for the expansion of the [U.S. company] in its aim to wholesale the line of USA manufactured diesel injection and tractor parts currently being sold overseas and locally.
- He will continue to Planning [sic] of the daily activities of [the U.S. company], both in the local American market and the International export market.

The petitioner provided the following breakdown in terms of percentage of time the beneficiary spends on each duty:

- | | | |
|--|-----|--------------|
| • Review of financial reports | 20% | Approximate. |
| • Review of activity reports | 20% | " |
| • Management meetings | 20% | " |
| • Management of Subordinate Managers | 25% | " |
| • Management of Multinational Group Managers | 15% | " |

With respect to other employees, the petitioner stated that the U.S. company's staff consisted of "the President, the Sales Manager, the Administrative Manager, the Marketing Manager," and a

Commercial Coordinator to be hired in the future. However, the petitioner resubmitted the previous organizational chart that included only four employees -- the beneficiary as president, a vice president/secretary/director, an administrative manager and a marketing manager. The petitioner resubmitted the previous job descriptions for the vice president and administrative manager, and added a job description for the marketing manager.

According to the petitioner, the vice president/secretary/director acts as general sales manager for [the U.S. company] both in the United States and overseas. His job duties include:

- Frequent travel within the United States and abroad to maintain close contact with the customers and to meet with them on a monthly basis to assess their future buying requirements.
- Conducting sales marketing research both within the United States and overseas in order to determine the needs of each market section.
- Meets with customers to coordinate design concepts for customized . . . parts. Obtains final approval and determines the wholesales price and [quantity of orders].
- Periodically meets with corporate USA distributors to provide sales consultation and technical support . . .

The administrative manager's duties include:

- The production and review of the daily inventory reports.
- The control of inventory and shipment reports for both United States sales and overseas shipments.
- Coordination of the manufacturing requirement deadlines to meet the purchase orders placed on a timely basis.
- Contact with customers requirement shipping confirmation dates [sic].
- Update of the inventory items sheets for the over 1.600 diesel injection and tractor parts that this company sells or manufactures.
- Customer service representatives.
- **Order shipment fulfillment confirmation Dept. Manager to better serve the needs of the customers.**

The marketing manager's duties include:

- Production of marketing sales analysis reports.
- Permanent marketing research as supporting of the own products market position.
- Graphic display and reporting on the expansion of the USA diesel injection and tractor parts goal mission.
- Public relations person with new and established customers.
- Seeking new business customers in different geographic regions coinciding with the expansion plan in effect since the year 2000.

- In charge of generating target sales market information for further expansion and hire of new employees.

The petitioner also stated that, as chief executive officer of the petitioner's international group, the beneficiary manages ten managers based in Colombia and Venezuela. The petitioner provided the name, job title, and a brief description of the duties and education level of each of these employees.

On June 6, 2008, the director denied the petition, concluding that the petitioner had not established that the beneficiary will be employed by the U.S. company in a primarily managerial or executive capacity. The director found that the petitioner's claim that the beneficiary is acting in an executive capacity is primarily based on a set of broad job responsibilities which suggests a heightened degree of authority, but which fails to convey an understanding of what the beneficiary would actually do on a daily basis. The director also noted that at the time the petition was filed, the petitioner employed three employees, and the small number of employees indicates that the beneficiary is likely to be performing daily functions associated with running a business that may not qualify as managerial or executive. The director found that, based on the evidence provided, it cannot be concluded that the beneficiary is acting primarily in a managerial or executive capacity.

On appeal, counsel for the petitioner maintains that the beneficiary's daily activities as president of the U.S. company are executive in nature. Reiterating various aspects of the beneficiary's job descriptions, counsel asserts that the beneficiary oversees not only the daily activities of the U.S. employees, but also all the department heads of the petitioner's three affiliates in Colombia and Venezuela. Counsel also asserts that the beneficiary principally and primarily manages the company, and that he is clearly employed in an executive capacity according to the regulatory definition of that term.

Upon review, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily executive or managerial capacity.

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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, the U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

In this instance, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "the daily monitoring of the financial aspects of

[the U.S. company]," "directing and coordinating the activities of managerial personnel," "implementation and enforcement of budgetary guidelines" and "planning . . . the daily activities of [the U.S. company]." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. Further, in response to the director's request that the petitioner provides a breakdown in percentage of time the beneficiary spends per duty, the petitioner stated that the beneficiary spends 20% on the review of financial reports, 20% on the review of activity reports, 20% on management meetings; 25% on the management of subordinate managers, and 15% on the management of multinational group managers. The petitioner provided no details as to what activities of the managerial personnel or of the company the beneficiary would be planning, directing or coordinating; what "monitoring [the] financial aspects of the company," or implementing and enforcing the budgetary guidelines would entail; or what specific tasks "management of the subordinate managers" would involve. The regulations require, and the director requested in the RFE, a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

Along with showing that the beneficiary performs the high-level responsibilities that are specified in the definitions of "executive capacity" and "managerial capacity," the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, there is insufficient evidence to demonstrate what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. In view of the broadly drawn categories of responsibilities as described above, and the lack of details regarding the beneficiary's daily tasks, the AAO cannot determine whether the beneficiary is *primarily* performing the duties of a manager or executive. *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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988)).

Further, counsel claims that the beneficiary functions primarily in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise.

Additionally, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In this instance, the evidence does not establish that the beneficiary supervises a subordinate managerial level of employees. While the petitioner claimed that the beneficiary has three employees with managerial titles under his direction, the record does not support the conclusion that these employees function in a managerial capacity. None of these employees -- the vice president acting as sales manager, the administrative manager, and the marketing manager¹ -- supervises subordinate staff, such that they could be considered "personnel managers" or supervisors. Nor can the beneficiary's subordinates be considered "function managers," insofar as each appear to be directly performing the duties relating to the sales, administrative, and marketing functions, respectively, rather than managing these functions. 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. *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.

The evidence also fails to establish that the beneficiary manages "professional" employees. In evaluating whether the beneficiary's subordinate employees are professionals, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The petitioner appeared to indicate that the beneficiary's subordinate employees have some university-level education, although the meaning of the term "universitary formation [sic]" used to describe each of these employees' educational level is unclear. Regardless, the petitioner has not provided any evidence that a bachelor's degree is actually necessary to perform the functions of any of the beneficiary's subordinates. As such, the petitioner has also failed to establish that the beneficiary supervises professional employees. Finally, it is noted that the petitioner claimed that the beneficiary spends 15% of his time managing multiple managers within the petitioner's international group. However, the petitioner failed to

¹ It is unclear based on the record whether the marketing manager was actually employed by the petitioner at the time the petition was filed. As previously noted, while the organizational chart provided in response to the first RFE shows that there was a marketing employee on staff, the petitioner did not submit a Form W-2 or job description for that employee with the initial petition or in its response to the first RFE.

describe in any detail the beneficiary's management duties in connection with that group of employees, nor does the petitioner explain how the international employees would relieve the beneficiary from performing the day-to-day, non-qualifying duties in connection with the operations of the U.S. company. In fact, the brief descriptions of the job duties of these foreign managers indicate that their responsibilities are linked to the facilities where they are located, in Colombia or Venezuela, and are not integrated into the operations of the U.S. company.

In light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary would be employed in a primarily executive or managerial capacity in the United States. For that reason, the petition will be denied.

The second issue in this matter is whether the petitioner was doing business for at least one year prior to the filing of the petition.

The regulation at 8 C.F.R. § 204.5(j)(3)(i) states:

Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

* * *

(D) The prospective employer has been doing business for at least one year.

Further, the regulation at 8 C.F.R. § 204.5(j)(2) states:

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.

In the second RFE, the director requested that the beneficiary submit "evidence of the business conducted by the United States entity, such as invoices, bills of sale, and product brochure of goods sold or produced by the company" dating from August 2001 to the present.

In response, the petitioner provided, among other things, (1) a lease agreement for the premises located at the petitioner's current address, dated December 14, 2000 with an automatic renewal clause for up to three years after that date; (2) a number of customer referrals, including a letter dated April 23, 2003 from Costex Tractor Parts, stating that it has been doing business with the petitioner since 1999, and a letter dated April 28, 2003 from colBOX, Inc., stating that the petitioner has been its customer since 2000; and (3) a list of the U.S. company's invoices from August 23, 2001 through March 31, 2003, listing the date, number and amount of each invoice. The petitioner also submitted numerous copies of invoices of transactions in which it was either the customer or provider. However, it is noted that the invoices submitted only go back as far as January 17, 2002.

In denying the petition, the director found that the petitioner failed to demonstrate that it has been doing business for at least one year prior to the filing of the petition. The director noted that, although the RFE explicitly asked the petitioner to provide evidence that it was doing business from August 2001 to the present, the petitioner submitted evidence that the company was doing business in 2002 and 2003, but failed to provide any evidence of that nature for the year 2001.

On appeal, counsel for the petitioner asserted that since its incorporation in December 1999, the U.S. company has been actively conducting its business and has filed its annual tax returns with the IRS. Counsel also maintains that the petitioner has provided ample evidence of business conducted as requested, and would submit further evidence if needed. The petitioner submitted copies of its 2000 and 2001 Forms 1120, U.S. Corporation Income Tax Return, in support of this assertion. The petitioner's Forms 1120 indicate that its gross receipts or sales totaled \$328,497 for the year 2000, and \$438,666 for the year 2001.

Upon review, the AAO finds that the petitioner has sufficiently shown that it had been doing business for at least one year prior to the filing of the petition. While the record lacks copies of the U.S. company's invoices predating 2002, it does contain a detailed list of the company's sale invoices going back to August 2001, as well as letters from third parties confirming that they have conducted business with the petitioner since 1999 and 2000. These items, along with the gross receipts figures on the petitioner's corporate tax returns submitted on appeal, sufficiently demonstrate that the company has been "doing business," as defined under 8 C.F.R. § 204.5(j)(2) for at least one year prior to the filing of the petition. Accordingly, the director's finding with regards to that issue is hereby withdrawn.

Notwithstanding the foregoing, however, the petitioner has failed to establish that the beneficiary will be primarily employed in the United States in a managerial or executive capacity, as discussed earlier. For that reason, the petition will be denied.

The AAO acknowledges that USCIS has previously approved multiple L-1A petitions filed by the petitioner on behalf of the instant beneficiary. The AAO also notes that, as the petitioner indicated, the petition was first submitted in August 2002 and was adjudicated in June 2008. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103. Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 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. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Despite any number of previously approved petitions, and any delay between the initial submission of a petition and its adjudication, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act. Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approvals by denying the instant petition.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.