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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED]
SRC 07 800 23180

OFFICE: TEXAS SERVICE CENTER

Date: **SEP 23 2009**

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:
[REDACTED]

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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Nevada corporation that seeks to employ the beneficiary as its chief executive officer. 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 based on three independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 3) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel disputes the director's conclusions and submits a brief and supporting documentation in an effort to overcome all three grounds for the denial.

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 two issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he would be employed in the United States in a qualifying managerial or executive capacity.

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 July 31, 2007 in which the petitioner stated that at the time of filing it had nine employees. The petitioner offered the following statements describing the beneficiary's proposed and foreign positions, respectively:

[The beneficiary] will continue to manage the entire organization, which will include supervising the work of other supervisory, professional, or managerial employees. He will have authority over all personnel actions, including hiring and firing employees. He will exercise discretion over the day-to-day operations of the entire organization and establish the goals and policies of the organization. More specifically, [the beneficiary] will oversee the management of the manufacturing facility; the training of staff on the new equipment; and the marketing of [the petitioner]'s products. He will coordinate and oversee the implementation of the expansion of our products into the international and national markets. . . .

[The beneficiary] has over twenty years of business management experience. He has overseen the successful start[-]up operations of several companies throughout this time, including Horizontal Boring. Since 1994, [the beneficiary] has served as CEO of Horizontal Boring, where he has built one of the largest drilling companies in South Africa.

His job responsibilities during this time have been the same or similar to what [he] will do in the United States. He has managed the entire organization, including supervising the work of other supervisory, professional, or managerial employees. He has the authority over all personnel actions, including hiring and firing employees. He has exercise [sic] of discretion over the day-to-day operations of the entire organization and establishes the goals and policies of the organization. . . .

The petitioner also provided a document entitled "Current Organizational Chart for Cili Minerals," which shows the beneficiary at the top of the company's hierarchy and an administrative manager as the beneficiary's immediate and only subordinate. The administrative manager is shown as overseeing a financial manager, who is shown as overseeing two shipping employees, an ordering employee, a bottling employee, and a factory general manager.¹

After reviewing the submitted documentation, the director denied the petition in a decision dated June 30, 2008, concluding that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive

¹ The petitioner also provided a second organizational chart entitled "Projected Organizational Chart of August 1st 2006 for Cili Minerals." As the instant Form I-140 was filed in July 2007, it is unclear how this chart is relevant in the present matter, as it does not appear to be an accurate representation of the petitioner's organizational hierarchy at the time of filing. It appears, therefore, that the projection date on the chart is a typographical error and that the chart is meant to describe the petitioner's organizational hierarchy at some future date, which is undetermined due to the perceived anomaly. Regardless, as the chart does not appear to reflect the petitioner's organizational hierarchy at the time of filing, it has little to no probative value in establishing the petitioner's eligibility for the immigration benefit sought herein. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), requiring a petitioner to establish eligibility at the time of filing.

capacity. The director found that the petitioner's description of the beneficiary's proposed employment consisted of broad job responsibilities and various non-qualifying tasks to which the petitioner failed to detail the amount of time assigned to perform each task.

On appeal, counsel describes the beneficiary as the top executive within the foreign entity's organizational hierarchy, claiming that the foreign entity consists of two divisions whose directors report directly to the beneficiary, while the beneficiary "focused on higher level responsibilities such as developing new clients, negotiating sales of products, evaluating product lines, evaluating project specifications and finalizing all products offered." Counsel also states that the beneficiary set the company's goals and reviewed all financial data. With regard to the beneficiary's proposed U.S. employment, counsel claims that the beneficiary would oversee the work of other managers and set the company's goals and policies. Counsel further claims that the beneficiary "continues to develop and design new equipment to manufacture mineral supplements."

Additionally, the petitioner provides a sample of the beneficiary's daily activities as well as a list of the beneficiary's job duties and responsibilities with the U.S. and foreign entities. The following is information offered with regard to the beneficiary's proposed U.S. employment:

- Bi-weekly meetings with heads of divisions and departments.
- Weekly meetings with South African company managers and directors via internet, email, Skype, and landlines.
- Overseeing and exercising discretion over [the] entire operation in South Africa and the U[.]S[.]A.
- Board meetings bi-weekly with South Africa and the U[.]S[.]A[.] directors on live internet feed or conference calls.
- Meeting and negotiating with international and national distribution and marketing companies.
- Final say on staff placement and removal.
- Creating goals for divisions, departments, and managers for better business performance.
- Negotiating with prospective retail customers. . . .
- Supervising the construction of new offices as the old retail division burnt down June 9th, 2008.
- Overseeing compliance with FDA and other applicable regulations.
- Finalizing and deciding on our new product ranges and the mineral make[-]up of each product. . . .
- Co-ordination of, and, [sic] implementation of manufacturing, wholesale, and retailing policies of [the] entire organization.
- Negotiating with international trade organizations and N[AFTA].
- Negotiating with suppliers and wholesalers for products.
- Negotiating with old and current South African clients interested [in] utilizing [B]oring technology to lay underground cables and pipes.
- Meeting with physicians, chiropractors, naturopaths and other health practitioners regarding [the petitioner's] non-invasive health products.
Designing manufacturing equipment.

- Obtaining bids for ingredients of each product to negotiate the best deal for the company.
- Developing and overseeing new technologies in mineral supplements. . . .

The beneficiary's sample daily schedule shows that the first two hours of the beneficiary's day would be spent on conference calls with representatives of the foreign entity as a means of overseeing the foreign entity's business activities. The beneficiary would spend another hour meeting with the petitioner's managerial staff and one more hour meeting with the accounting manager to check the petitioner's finances. The beneficiary would then spend an hour and a half consulting with customers of the foreign and U.S. entities and negotiating the purchase and sale of products. Another two hours would be spent consulting with engineering companies to ensure that product orders are on schedule and meeting with health practitioners to discuss private labeling, bulk buying and legal issues pertaining to FDA and AMA regulations. The beneficiary would spend the remaining hour and a half ensuring timely production and distribution.

The petitioner submitted a similar list of job duties and sample daily schedule for the beneficiary's position abroad. As the beneficiary's job duties abroad did not include overseeing any entity other than the foreign entity, the beneficiary's work day abroad was shorter. Similarly, the list of the beneficiary's foreign job duties did not include any tasks performed for the U.S. entity. However, in all other respects, the beneficiary's tasks with the foreign and U.S. entities were virtually identical.

After reviewing the supplemental information offered on appeal, the AAO finds that counsel's arguments are not persuasive. It is noted that in examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the present matter, the job descriptions offered do not establish that the primary portion of beneficiary's time has been and would be spent performing qualifying tasks. First, with regard to the description of the beneficiary's prospective U.S. employment, the petitioner claimed that the first two hours of the beneficiary's day would be spent communicating with the foreign entity as a means of overseeing that entity's activities. It is noted, however, that any time spent performing any tasks, oversight or otherwise, for the foreign entity cannot be considered in determining whether the beneficiary's prospective employment with the petitioner would be within a qualifying capacity. Even if these specific tasks would normally be deemed managerial or executive with regard to the foreign entity, they would be deemed tasks necessary to provide a service, albeit a management service, on behalf of the petitioner and, thus, would be non-qualifying. 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).

Second, the beneficiary's U.S. and foreign job descriptions include such non-qualifying tasks as meeting and negotiating with marketing companies; negotiating with prospective retail customers, international trade organizations, and suppliers and wholesalers; meeting with health practitioners to promote the company's health products; and designing manufacturing equipment. These various job duties are outside the scope of what is deemed to be within a qualifying capacity, as they are suggestive of tasks that are necessary to produce a product or to provide services. Again, 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. at 604. Although the petitioner has provided sample schedules of the beneficiary's daily activities both abroad and in the United States, neither schedule establishes the portion of the beneficiary's time that has been and would be spent designing manufacturing equipment and meeting with marketing companies, international trade organizations, and suppliers and wholesalers, despite the fact that these non-qualifying job duties were all listed in the beneficiary's job descriptions. Thus, neither daily schedule allows the AAO to accurately assess how much of the beneficiary's time has been and would be allotted to numerous non-qualifying job duties that were included in the job descriptions offered on appeal. While the job descriptions also indicate that the beneficiary has and would assume a position involving a high degree of discretionary authority, the petitioner fails to establish that the primary portion of the beneficiary's time has been and would be spent exercising his discretionary authority or performing other tasks within a qualifying managerial or executive capacity. Accordingly, the AAO cannot conclude that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity and, on the basis of these two independent grounds of ineligibility, this petition cannot be approved.

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 support of the Form I-140, the petitioner provided a copy of a document entitled "Unanimous Written Consent in Lieu of First Meeting of the Board of Directors," which identifies the beneficiary

as the owner of 600 shares of the petitioner's stock with a capital contribution of \$60; and [REDACTED] and [REDACTED] each as owner of 200 shares of the petitioner's stock with a capital contribution of \$20 each. The record contains stock certificate nos. 1-3 reiterating the same ownership scheme as was conveyed in the above document. With regard to the foreign entity, the petitioner provided a photocopy of a translated foreign document naming [REDACTED] the beneficiary, as owner and founder of the foreign entity. The same document also indicates that the foreign entity has only one member.

In light of the above, the AAO finds that the director failed to properly consider the foreign document as a testament of the beneficiary's ownership of the foreign entity. As such, the director's finding that no evidence was submitted to establish who owns the foreign entity is hereby withdrawn.

Notwithstanding the director's oversight, the record as presently constituted precludes the AAO from finding that a qualifying relationship exists between the beneficiary's foreign and U.S. employers. The AAO bases its conclusion on significant discrepancies found in the record. Specifically, while the above documentation indicates that the petitioner is owned by three separate individuals who were issued a total of 1,000 shares in exchange for a capital contribution of \$100, the petitioner's 2006 corporate tax return, which was also submitted in support of the Form I-140, names the beneficiary as the sole owner, owning 100% of the petitioner's common stock.² Schedule L, item 22(b) of the same tax return shows that the petitioner received \$5,000 in exchange for issuing its common stock. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the present matter, it is clear that the information found in the petitioner's 2006 tax return is inconsistent with the remainder of the supporting documents. The petitioner has provided no documentation that would account for or reconcile what the AAO deems to be a considerable inconsistency.

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 (BIA 1988); *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 above described anomalies with regard to the ownership of the petitioning entity preclude the AAO from being able to rely on the submitted documentation. Therefore, the AAO cannot conclude that the foreign and U.S. entities are similarly owned and controlled.

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

² See Form 1120 for 2006, Schedule E.

In the present matter, the petitioner has indicated that its retail store and offices burned down on June 9, 2008. The AAO therefore questions the petitioner's ability to continue its U.S. operations as a result of the given circumstances.

According to the regulation at 8 C.F.R. § 204.5(j)(2), the term *multinational* applies to 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) also 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." As the petitioner lost the physical premises used to conduct business, the AAO questions the petitioner's ability to do business in the United States such that it continues to fit the definition of a multinational entity.³

Lastly, while also not addressed in the director's decision, by virtue of the beneficiary's claimed ownership of the U.S. petitioner, it appears more likely than not that the beneficiary will not 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 U.S. Citizenship and Immigration Services (USCIS) 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

³ The petitioner bears the ultimate burden of proving eligibility; its burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984).

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 Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449-450 (2003); 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. Regardless of whether the beneficiary is the sole or majority owner of the U.S. entity, as simultaneously indicated by the documentation discussed above, there is no evidence that anyone other than the beneficiary himself is in a position to exercise any control over the work to be performed by the beneficiary. As such, it

appears the beneficiary is the employer for all practical purposes. He will control the organization; set the rules governing his work; and share in all profits and losses.

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). Therefore, 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.

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.