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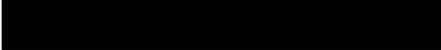


**U.S. Citizenship
and Immigration
Services**

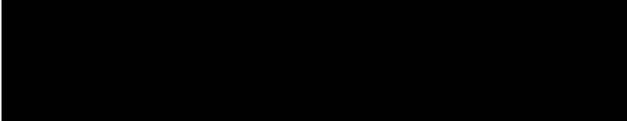


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FILE:  OFFICE: NEBRASKA SERVICE CENTER Date: **JAN 14 2010**
LIN 07 176 51155

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


Perry Rhew
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 is a limited liability company organized in the State of Oregon. It seeks to employ the beneficiary as its chief executive officer (CEO). 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputes the director's decision and submits a brief in which he argues that the various statements made in the denial lack foundation.

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 two primary 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.

The petitioner submitted an attachment to the Form I-140 in which it provided the following percentage breakdown of the beneficiary's proposed U.S. employment:

- Direct [the petitioner]'s financial goals, objectives and budgets (40%)
 - Prepare financial goals and objectives that underline profitability and target revenue
 - Prepare, [r]eview and [m]odify monthly budgets for the following:
 - a) Expected [s]ales and [r]evenues
 - b) Expected [c]ost of [s]ales by product type, quantity and quality[.]

- c) Budgeted [a]dvertising expenses for the following three months based on [e]xpected [s]ales and [c]ost of [s]ales[.]
 - Compare quarterly financial data with budgeted financial data
 - Prepare the [c]ompany's annual marketing and advertising strategy in consultation with the [c]ompany's [m]arketing [m]anager[.]
 - Prepare goals for [c]ompany personnel and evaluate performance towards these goals and their achievements on a half yearly basis[.]
- Oversee reinvestment of capital and management associated reinvestment risks, such as cash-flow issues (20%)
 - Review the monthly cash flow statements prepared by the [a]dministrative [m]anager[.]
 - Plan the expansion of operations based on forecasted cash flows[.]
 - Negotiate cash discounts with suppliers in times of positive cash flows[.]
 - Create an Expansion Fund to help [c]ompany expansion through the careful reinvestment of [c]ompany profits and excess working capital[.]
 - Ensure that surplus cash is invested in [t]erm [d]eposits and [m]utual [f]unds or is used to pay vendors offering a [c]ash [d]iscount[.]
 - Ensure all liabilities are paid in a timely manner[.]
 - Ensure that an adequate level of working capital is maintained and that there exists adequate liquidity
- Supervise cash management activities by way of weekly meetings with management staff (15%);
 - Review the [d]ebtors, [s]ales and [v]endor [p]ayables on a weekly basis[.]
 - Understand reasons for variances from budgets especially for [s]ales and [r]eceivables and find resolutions to problems that management faces in achieving these goals[.]
 - Ensure that the [a]dministrative [m]anager records all transactions and updates all accounts on a day[-]to[-]day basis[.]
- Execute capital raising strategies to support [the petitioner]'s further expansion to surrounding communities and, eventually, to generate \$5 million USD in year three (5%);
 - Identify and analyze newer markets and additional revenue streams for the [c]ompany's merchandize[sic]
 - Identify partnerships with similar businesses that the [c]ompany can enter into
 - Identify reasons, means and resources to raise capital through the [c]ompany's parent in India
 - Partner with U[.]S[.] Banks and [f]inancial [s]ervices [c]ompanies to help consumers buy the merchandise of the [c]ompany
 - Locate retail spaces in [Oregon, Washington, and British Columbia] over the next three years to help in retail sales

- Implement financial policies downwards through our expanding organization through our [a]dministration [m]anager and [m]arketing [m]anagers (15%);
 - Evaluate the need to employ additional personnel
 - Evaluate employee performance and conduct . . . performance reviews.
 - Conduct weekly meetings with the [a]dministrative and [m]arketing [m]anagers to understand and resolve problems

- Review marketing reports generated by management to guarantee that operations costs do not overrun our budget (5%);
 - Study, evaluate and select the best marketing mode and channel to successfully reach the [c]ompany's target consumer.
 - Study the marketing expense report Ensure that advertising campaigns that are not cost effective are discontinued[.]
 - Provide sales incentives to the marketing manager to help encourage a more aggressive approach in the marketing of the [c]ompany's merchandise.
 - Ensure MIS from the [m]arketing [m]anager is up to date and suggest improvements to ensure that data is more meaningful[.]

- Ensure financial controls through independently contracted CPA Firm (Delegated).
 - * * *

- Ensure continuous improvements to the [c]ompany website and auction sites[.]
 - * * *

The petitioner also provided its organizational chart, depicting the beneficiary at the top of the hierarchy and four managerial positions—an administrative manager, two marketing managers, and a product design and development manager—directly subordinate to the beneficiary. The notations on the chart show that of the four managerial positions only two—the administrative manager and one marketing manager—were actually filled at the time the petition was filed. Although the chart shows that an office assistant as well as three sales representatives would be hired at a future time, these positions appear to have been vacant at the time of filing. Thus, the petitioner appears to have been staffed with three employees, including the beneficiary, at the time of filing. Lastly, the AAO notes that the petitioner did not provide an organizational chart of the foreign entity or a separate description of the beneficiary's foreign employment.

On April 9, 2008, the director informed the petitioner that insufficient evidence had been submitted in support of the Form I-140. Accordingly, the director issued a request for additional evidence (RFE) instructing the petitioner to provide a supplemental description of the beneficiary's foreign and proposed employment. The petitioner was asked to describe the beneficiary's job duties in both positions in detail, specifying the actual daily tasks and the percentage of time abroad and in the U.S. position that would be attributed to each of the enumerated tasks. The petitioner was also instructed to provide an organizational chart for each entity clearly depicting each entity's staffing hierarchy.

In response, counsel submitted a letter dated June 27, 2008 in which he provided a lengthy percentage breakdown of the beneficiary's duties and responsibilities. Counsel's breakdown was divided into four main

categories: management to which 35% of the beneficiary's time would be allotted; financial responsibilities to which another 35% of the beneficiary's time would be allotted; personnel, to which 14% of the beneficiary's time would be allotted; compliance to which 6% of the beneficiary's time would be allotted; and other executive functions to which the remaining 10% of the beneficiary's time was allotted. With the exception of the last category, which lacked a specific heading, each of the first four categories is further subdivided to provide clarification as to the beneficiary's role with regard to management, company finances, and compliance. The beneficiary's management responsibility would include reviewing organizational strategy, identifying new revenue sources, conducting meetings with company managers, reallocating company resources, reviewing how management implements controls and systems for revenue generation, meeting with suppliers, and seeking out acquisition and merger opportunities by reviewing trade magazines, visiting trade shows, and identifying businesses with multiple retail locations in the Northwest region. Next, the beneficiary's financial responsibility would include identifying ways to raise capital and reviewing activity reports and financial statements, increases in costs of raw materials and labor, capital expenditures, and the company's reinvestments. The third category—personnel—would require that the beneficiary evaluate the performance of executives, ensure equitable personnel policies, protect employee interests, determine managerial authority limits, make personnel decisions regarding promotions, demotions, and dismissals, and control use of consultants. Lastly, the fourth category—compliance—would require that the beneficiary ensure statutory and regulatory compliance with regard to various filing requirements and communicate regularly with the administrative manager regarding meeting regulatory filing and reporting requirements. Counsel provided no further information with regard to the "other executive functions" that would consume the remaining 10% of the beneficiary's time.

Although the petitioner also provided an updated organizational chart, it is noted that the initial organizational chart identified all the positions the petitioner had filled as of the date the petition was filed. As the petitioner is expected to establish eligibility at the time of filing, the initial organizational chart, which depicted the petitioner's organizational hierarchy at the time of filing, is more relevant in the present proceeding. Thus, while the AAO notes the petitioner's expanding personnel since the filing of the Form I-140, any employees whom the petitioner had not yet hired at the time of filing will not be considered in the AAO's analysis, which specifically seeks to determine whether the petitioner was qualified to employ the beneficiary in the classification of multinational manager or executive at the time of filing.

The petitioner also provided the foreign entity's organizational chart, which depicts the beneficiary as the senior managing partner and president of the company. The beneficiary's direct subordinate was identified as the managing partner and company CEO, whose subordinates included a manager of production and raw material, a manager of sales and exports, and an accounting/bookkeeper. The remainder of the chart listed three office staff, one supervised by the manager of sales and export and two other staff members supervised by the manager of production and raw material. Lastly, the petitioner provided a lengthy percentage breakdown, which showed that the beneficiary's time was divided in the following manner: 10% was allotted to formulating sourcing, production and distribution policies to enable the purchase of raw materials and merchandise; 20% was allotted to the direction of market research and development of new product lines, which required participation in trade shows, where 95% of the foreign entity's merchandise was marketing, and communicating with the sales and export manager; 10% was allotted to retaining production personnel, which included hiring personnel and maintaining relationships with product manufacturers; 10% was allotted to keeping track of incoming purchases from suppliers and outgoing materials in the form of finished merchandise; 10% was allotted to promoting the export of the foreign entity's finished jewelry merchandise by identifying new markets, communicating with existing wholesale buyers, learning market trends, and

launching new product lines; 10% was allotted to planning the company's trade show participation by identifying possible venues and communicating with show organizers; and the remaining 30% of the beneficiary's time was allotted to directing the compilation of sales and purchase reports, including a review of loss of materials during production. While the petitioner discussed the job duties of the other employees who comprised the foreign entity's organizational hierarchy, none of the employees were identified as sales personnel, thereby leaving unanswered the question of who actually marketed and sold the foreign entity's merchandise.

In response to the second RFE, which was issued on July 25, 2008, the petitioner provided four 2007 W-2 wage and tax statements, indicating that in 2007 the company paid wages to the beneficiary, one administration manager, one marketing manager, and the beneficiary's spouse, whose position is not identified in the organizational chart but whose name appears in Schedule E of the petitioner's 2007 tax return as a paid company officer.

After reviewing the petitioner's submissions, the director issued a decision dated September 30, 2008 in which he denied the petition, 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 capacity. With regard to the U.S. entity, the director noted that the nature of the business and the overall organizational hierarchy do not warrant the hiring of an employee who would primary perform qualifying job duties within a managerial or executive capacity.

On appeal, counsel asserts that the director's denial falls short of the guidelines set out in the Adjudicator's Field Manual (AMF) for the contents of an adverse decision. However, the AMF merely articulates internal guidelines for service personnel; it does not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). While the director's decision is somewhat lacking in details, particularly with regard to the finding concerning the beneficiary's foreign employment, the decision is not so devoid of relevant information as to preclude the petitioner from being able to gauge the basis for denial. Thus, while the petitioner may have benefited from a more detailed discussion of the adverse findings, the director provided sufficient information to enable the petitioner to formulate a meaningful appeal to overcome the grounds cited for denial.

Next, counsel contends that the director failed to consider the petitioner's reasonable needs and placed undue emphasis on the size of the petitioning organization without explaining why it is unreasonable to believe that the beneficiary would be employed in a qualifying capacity. Counsel's argument in this respect is not persuasive. In discussing the petitioner's organizational structure and the employee schedules, the director has provided sufficient indication that his concern lay with the fact that the petitioner was not sufficiently staffed at the time of filing and therefore was unable to relieve the beneficiary from having to primarily perform non-qualifying level tasks. In light of the documentation provided, the AAO agrees with the director's reasoning. The petitioner indicated at Part 5 of the Form I-140 that it had three employees at the time of filing. While the director determined, based on the number of Form W-2s the petitioner filed in 2007, that the petitioner had a total of four employees at the time of filing, the beneficiary's wife, who was among those issued a Form W-2, was not listed on the organizational chart the petitioner initially provided in support of the Form I-140. It therefore appears that the petitioner's staff at the time of filing was comprised of the beneficiary and two support employees.

As properly pointed out by the director, the number of employees the petitioner had at the time of filing is highly relevant in determining the petitioner's eligibility, as it allows U.S. Citizenship and Immigration Services (USCIS) to evaluate the validity of the beneficiary's job description. In other words, despite the need for an adequate job description, the petitioner must establish how realistic it would be that the beneficiary would primarily perform duties within a qualifying capacity in light of the organizational hierarchy that was in place at the time of filing. In the present matter, the petitioner's description of the beneficiary's prospective employment places excessive focus on the beneficiary's discretionary authority and overall placement within the organizational hierarchy. However, given that the petitioner's retail operation was comprised of two employees as the beneficiary's entire support staff, the claim that the beneficiary would spend the predominant portion of his time overseeing the retail operation's employees and major functions is not realistic. The record shows that despite the fact that retail was the source of the petitioner's revenue, it had no sales representatives at the time of filing. Thus, while the petitioner's organizational chart shows that the beneficiary would oversee two managerial employees, neither subordinate had subordinates of his/her own. Therefore, neither can be deemed a managerial employee other than in position title and the beneficiary cannot be deemed as someone overseeing managerial personnel. While the petitioner may have hired additional personnel since the filing of the petition, it is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel also contends that the director's discussion of whether the beneficiary's proposed employment fits the description of a function manager is irrelevant in the present matter, as the petitioner has not put forth the argument that the beneficiary would be employed as a function manager. While the AAO acknowledges counsel's confusion, a review of the record suggests that the director's discussion of a function manager was not in lieu of considering the petitioner's claim, but rather in addition to that claim, such as to ensure that the petitioner receives the benefit of all potentially relevant considerations. It is USCIS's general practice to apply all potentially relevant definitions to any proffered position, regardless of whether a petitioner claims that the beneficiary would be employed in a managerial capacity, in an executive capacity, or both. This practice ensures that any beneficiary whose proffered position qualifies under at least one of the statutory definitions does not get disqualified merely because the wrong statutory definition was requested. Thus, the director's application of the term function manager merely indicates that the petitioner was fully considered under any definition that may qualify the beneficiary for the desired immigrant classification. The director was correct in determining that the petitioner failed to establish that the beneficiary's proposed employment fits the definition of managerial capacity, as the beneficiary is neither a personnel nor a function manager.

With regard to the beneficiary's employment abroad the petitioner has also failed to establish that the beneficiary was employed in a qualifying capacity. The first source of confusion is the organizational chart, which seemingly depicts the beneficiary at the top of the hierarchy, but is accompanied by a job description that applies the same job description to the beneficiary and his wife, whom the chart depicted as the beneficiary's direct subordinate. The accompanying job description, which was provided in response to the first RFE, was equally applied to the beneficiary and his wife, who were referred to as managing partners. Thus, while the organizational hierarchy illustrated in the chart seemingly suggests that the CEO is subordinate to the beneficiary, the job description indicates that a different hierarchy may have been in place. 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 light of the inconsistency described herein, the AAO is unable to determine whom the

beneficiary supervised, if anyone, and whether the organizational chart contains other relevant inconsistencies that would undermine the claim that the beneficiary was employed in a qualifying capacity.

Additionally, the description of the beneficiary's past employment does not establish that the beneficiary was primarily employed in a qualifying capacity. More specifically, the petitioner indicated that the beneficiary spent part of his time seeking out new markets and trade shows as well as attending trade shows to promote the foreign entity's products. As the petitioner did not specify exactly what percentage of the beneficiary's time was spent attending trade shows, the AAO cannot determine what portion of 20% was attributed to this non-qualifying task. The petitioner also indicated that the beneficiary planned and implemented a system for purchasing, producing and ultimately selling merchandise and raw materials. However, it is unclear what specific daily tasks were performed in an effort to attain the ultimate objective of planning and implementing. Also, while the petitioner claimed that 10% of the beneficiary's time was attributed to retaining production personnel, it is unclear what portion of the beneficiary's daily activities was attributed to hiring staff. In fact, based on the personnel structure illustrated in the foreign entity's organizational chart, it does not appear that hiring staff was an activity that the beneficiary performed on a daily or even a weekly basis. The petitioner also failed to discuss exactly how much of the beneficiary's time was attributed to communicating with outsourced manufacturers, an activity that the petitioner has not established as fitting within the definition of managerial or executive capacity.

In light of the above analysis, neither the foreign entity's organizational hierarchy nor the beneficiary's foreign job description establishes that the beneficiary was employed abroad in a qualifying managerial or executive capacity. The anomaly regarding the organizational chart creates confusion as to the beneficiary's actual position within the foreign entity and further indicates that the beneficiary and the individual shown as his direct subordinate may have been performing the same set of job duties. The petitioner also failed to provide a job description that shows precisely how much of the beneficiary's time was devoted to non-qualifying tasks. With regard to the beneficiary's prospective employment, the petitioner failed to establish that it would employ the beneficiary within a qualifying capacity. While counsel addressed the subject of the beneficiary's proposed employment on appeal, he focused primarily on the deficiencies in the director's decision in an apparent effort to establish that the petitioner was not properly advised of the basis for denial. However, a review of the decision shows that the grounds for denial were adequately discussed and that the petitioner was given ample opportunity to overcome those grounds on appeal. However, the petitioner failed to establish that its organizational hierarchy at the time the Form I-140 was filed was capable of supporting the beneficiary in a primarily managerial or executive capacity. Therefore, based on the above observations, the AAO concludes that the petitioner has failed to establish that the beneficiary was employed or that he would be employed in a qualifying managerial or executive capacity.

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)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. In the present matter, the petitioner initially stated that the beneficiary's foreign employer is the parent entity of the petitioner. Article 6 of the petitioner's articles of organization shows that the petitioner is a member managed organization, naming the beneficiary and his wife as the company's two members. The petitioner also provided a copy of its 2007 tax return in which Schedule E identifies the beneficiary and his wife as each owning 50% of the petitioning entity. The documents showing that the beneficiary and his wife are co-owners of the petitioner are inconsistent with the petitioner's

initial claim in which the petitioner stated that it is a wholly-owned subsidiary of the beneficiary's foreign employer. As previously stated, the petitioner must resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92.

Second, Schedule E of the petitioner's 2007 tax return shows that the petitioner paid officer compensation to the beneficiary, in the amount of \$57,000, and to his wife, in the amount of \$14,000. However, according to the beneficiary's 2007 Form W-2, he was compensated only \$46,000, an amount that is \$11,000 below the amount indicated in the petitioner's 2007 tax return. This considerable unresolved discrepancy leads the AAO to question the validity of the documents submitted, which lead to further reevaluation of the credibility of the petitioner's claim to eligibility. *See id.*

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.