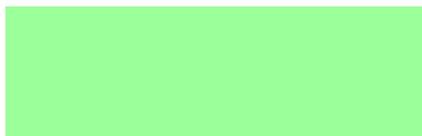




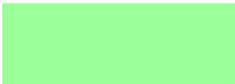
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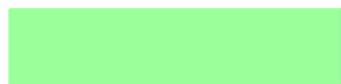
Office: TEXAS SERVICE CENTER

FILE: 

IN RE:

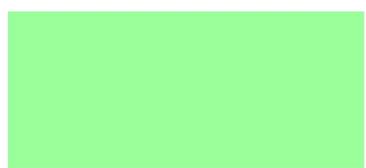
Petitioner:

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:

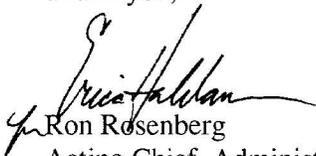


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner is a Florida company engaged in the retail and wholesale of fine jewelry. It seeks to employ the beneficiary as its General Manager. 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 failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the evidence of record is sufficient to establish that the beneficiary will be functioning in a managerial or executive position.

**I. The Law**

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).

## II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a 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), defines the term "executive capacity" as 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 indicated on the Form I-140, Immigrant Petition for Alien Worker, that it is a wholesaler of fine jewelry with three employees and gross sales of \$544,897. The petitioner stated that the organization is a

joint venture between the foreign employer and the petitioner. The petitioner indicated that the beneficiary will be working as its General Manager and provided a list of the beneficiary's duties.

The petitioner submitted copies of its IRS Form 941 Employer's Quarterly Federal Tax Returns for the first three quarters of 2011 and a payroll transaction ledger for 2011. The petitioner also provided a Profit & Loss statement for 2011. The Profit & Loss statement and payroll ledger both show payroll expenses of \$31,300.80. The petitioner made payments to three individuals including [REDACTED] and [REDACTED] during 2011.

The director issued a request for evidence ("RFE") requesting, *inter alia*, a detailed organizational showing all employees, titles, and job descriptions for the beneficiary's subordinates; a more detailed job description for the beneficiary including percentage of time spent on each duty; and copies of the petitioner's IRS Form 941 Employer's Quarterly Tax Returns for the fourth quarter of 2011 and the first two quarters of 2012. The director also requested evidence of the petitioner's employment of contractors, if applicable.

In a letter submitted in response to the RFE, the petitioner stated that the beneficiary will have overall control and management authority of the organization. Specifically, the petitioner provided the same duties as provided in the initial petition, and included a percentage breakdown for each duty, as follows:

- Preparation of annual operating and capital budgets, business plans and financial projections for Partner approval (10% of week);
- Implementing budgets and business plans approved by the Partners; represent the JV in business dealings with other parties (20% of week);
- Approve Budgets, business plans and other business dealings associated with the Joint Venture and its parties (30% of week);
- Negotiate contracts on behalf of the JV and sign contracts approved by the Partners (30% of week);
- Performing all other things necessary or advisable to ensure that the business of the JV is carried out properly and legally in the best interest of the JV. (10% of week).

The petitioner indicated that the company currently has six employees and contractors, all of which would report directly or indirectly to the beneficiary. The petitioner provided the requested organizational chart showing the beneficiary as General Manager. Reporting directly to the beneficiary is a Vice President. Reporting to the Vice President is a Sales/Buyer, a Sales/Merchandising position, and a contracted jeweler position. The petitioner identified two additional sales/merchandising staff as "1099 contract employees." The petitioner provided position descriptions for each position within the company.

The petitioner also submitted copies of its IRS Form 941, Employer's Quarterly Federal Tax Return, for 2012, which indicate that the petitioner had two employees throughout the year. The petitioner also submitted IRS Forms 1099-MISC for 2011 showing \$60,000 in "other income" paid to the jeweler, and payments of \$8,109 and \$47,240, respectively, paid to the two contracted sales/merchandising employees and reported as "Section 409A income."

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director found that the petitioner failed to

provide a detailed description of the beneficiary's proposed job duties. The director also found that the petitioner failed to submit the Forms 1099-MISC for all contract employees listed on the organizational chart. The director therefore concluded that the petitioner does not have the organizational complexity required to support a managerial position.

On appeal, counsel asserts that the beneficiary's job duties support a finding that the offered position is managerial in nature and emphasizes that the beneficiary supervises a subordinate managerial employee. Finally, counsel asserts that the director made a mistake of fact in finding that the petitioner failed to submit all of the Forms 1099-MISC for the contract employees listed on the organizational chart.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves 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); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The beneficiary's job descriptions submitted in support of the initial petition and in response to the RFE were overly general and vague, and therefore the AAO is unable to gain a meaningful understanding of how much time the beneficiary will spend performing qualifying tasks versus those that would be deemed non-qualifying. For instance, the petitioner stated that the beneficiary will perform the following tasks: approve budgets, business plans and other business dealings; implement budgets and business plans; prepare operating and capital budgets; and perform all other things necessary or advisable. These duties provide little or no insight into what the beneficiary will primarily do on a day-to-day basis or how he will carry out his objectives as General Manager. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

Beyond the required description of the job duties, 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.

The petitioner claims to operate a wholesale and retail jewelry business with two current payroll employees and a vice president, an owner of the company, who is not on the payroll. Finally, the petitioner claims to have three additional staff members working as independent contractors. However, there are inconsistencies in the petitioner's evidence which cast doubt on whether it actually employed these independent contractors. At the time of filing, the petitioner submitted a copy of its 2011 Profit and Loss statement. This statement does not include any line item under expenses showing over \$105,000 in payments made to independent contractors as shown on the subsequently submitted Forms 1099-MISC for 2011. The record does not include the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2011, which would provide additional confirmation that these payments were actually made. The petitioner's 2010 IRS Form 1120 does not reflect any payments to contractors. The petitioner's payroll ledger for 2011 shows 12 weekly checks for \$369.40 paid to [REDACTED] the jeweler, between January 6, 2011 and March 31, 2011, and no subsequent payments to him, yet the petitioner submitted a Form 1099 indicating that he received \$60,000 from the company in 2011. In addition, the social security numbers (last four digits only provided) indicated on the Forms 1099 are the same for two of the three claimed contractors. 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). Finally, the petitioner has not provided any evidence of payments to contractors made in 2012, the year in which the petition was filed. Given these discrepancies and omissions, the petitioner has not established that it actually employed all three contractors at the time of filing.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

On appeal, counsel states that the beneficiary "will manage the professionals or a managerial employee(s)." In evaluating whether the beneficiary manages professional employees, 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'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). The petitioner did not indicate that any of the positions on the organizational chart require the employee to have a bachelor's degree or that any of the workers have

completed a degree, and thus the record does not support counsel's claim that the beneficiary would manage professional employees.

The sole subordinate manager or supervisor identified on the organizational chart is the petitioner's vice president, who is described as being "in charge of the daily operations and management of the company." While the organizational chart shows all subordinate employees and claimed contractors reporting to the vice president, the record does not document the employment of any workers other than the sales/buyer and sales/merchandising employee. Given the nature of the business, a retail store that is described as being open on evenings and weekends, it is evident that all three current employees would need to participate in the day-to-day operations of the company in order to keep the store staffed during its operating hours. Further, even if the petitioner established that the vice president serves in a supervisory or managerial position, the petitioner's breakdown of the beneficiary's job duties does not indicate that he will allocate any portion of his time to supervisory duties. The petitioner has not established that the beneficiary qualifies for the benefit sought as a manager.

Furthermore, the petitioner has not established that it will employ a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility. Regardless of the beneficiary's position title, the petitioner has not established that the beneficiary will function at a senior level within an organizational hierarchy.

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and the appeal will be dismissed.

### III. Qualifying Relationship

Additionally, while not previously addressed in the director's decision, the AAO finds that the record contains other deficiencies that preclude approval of the petition, specifically with respect to the petitioner's claimed qualifying relationship with the beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

In a letter in support of the petition, counsel stated that the petitioner recently entered into a Joint Venture with [REDACTED], the beneficiary's foreign employer located in China. Counsel stated that "the Joint Venture will be the subsidiary of the corporation in China." Counsel further explained the relationship as follows:

In the instant case [the petitioner] and [REDACTED] have entered into a Joint Venture Agreement, attached hereto, where the Joint Venture in the US shall be conducted under the name of [REDACTED] and [REDACTED] will make contributions to the Joint Venture. Each company effectively has control of the Joint Venture through its veto power (See section 6(c) of the Joint Venture Agreement, Exhibit 19). Therefore, each partner shall possess the same rights and powers as a general partner in a Joint Venture formed under the laws of the state. Also, the profit and losses of the Joint Venture shall be allocated 50% to each partner. . . . Additionally, hereto attached please find confirmation of a wire transferred [sic] made by the [REDACTED] (Chinese Partner) for the purposes of the Joint Venture in the amount of \$299,820.

The petitioner submitted only a partial copy of the Joint Venture agreement in support of the initial petition, including pages 6 to 14 of the 14-page agreement. The petitioner also submitted a copy of a letter from an attorney addressed to [REDACTED] advising that the petitioner's corporate relationship with the Chinese entity is based on "an unregistered joint venture agreement."

U.S. Citizenship and Immigration Services (CIS) accepts the interpretation that a 50-50 joint venture creates a subsidiary relationship for purposes of section 101(a)(15)(L) of the Act, see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary"). Neither the Act nor the regulations provides a definition of the term "joint venture." However, the AAO has applied a broad definition of joint venture in prior decisions. *Matter of Hughes* states that a joint venture is "a business enterprise in which two or more economic entities from different countries participate on a permanent basis." *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (quoting a definition from Endle J. Kolde, *International Business Enterprise* (Prentice Hall, 1973)). *Matter of Siemens Medical Systems, Inc.* states: "Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents." 19 I&N Dec. 362, 364 (BIA 1986). A joint venture must be formed as a corporation or other legal entity. A business created by a contract as opposed to one created under corporation law is not be deemed a "legal entity." *Matter of Hughes*, 18 I&N Dec. 289, 294 (Comm. 1982); see also *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970).

In this case, there is no evidence of a "third corporation" or other legal entity formed by the petitioner and the beneficiary's foreign employer, and thus no evidence of a valid joint venture relationship for immigration purposes. The petitioner cannot establish the existence of a qualifying joint venture relationship simply by submitting a joint venture agreement indicating that the petitioner agreed to provide 50% control of its

existing business to a foreign entity, with no transfer of ownership and no creation of a separate joint venture entity. 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 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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.

Here, there is no evidence that the beneficiary's foreign employer has acquired any stock ownership in the petitioning company, such that the petitioner could be considered a subsidiary of the Chinese company. There is nothing in the partial copy of the joint venture agreement indicating that the petitioner's two shareholders have transferred or intend to transfer any ownership interest to the foreign entity. The petitioner provided evidence that the beneficiary had a balance of \$299,820 in his personal bank account as of December 2011, and indicated that the foreign contributed this amount to the joint venture. However, the petitioner did not provide evidence to establish that this money originated with the foreign entity, that it was intended to be used to purchase at least 50% of the petitioner's stock or an interest in a joint venture entity, or that these funds have been transferred to the petitioner or to a separate joint venture entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In addition, the limited purpose of the proposed joint venture, as described by the petitioner, also raises the question of the petitioner's intent to enter into anything more than a temporary agreement with the beneficiary's foreign employer to obtain the beneficiary's services for the wholesale of jewelry. The joint venture agreement states that the one condition for dissolution is there "being no further work for the J.V. in accordance with its purposes; or 18 months." This clause suggests that the initial term of the joint venture agreement would expire during the beneficiary's requested period of employment.

Further, it is noted that, even if the petitioner and the foreign entity had formed a qualifying 50-50 joint venture prior to the date of filing the petition, the petitioner in this case is not the joint venture itself, but rather one of the partners or shareholders in the claimed joint venture. The partners or shareholders of a 50-50 joint venture do not acquire a qualifying corporate relationship by virtue of forming a joint venture; the qualifying relationship formed exists only between each individual parent and the joint venture entity. Other than the petitioner's statement that the beneficiary would be employed by the joint venture, there is no indication that the petitioner intended to file the petition on behalf of a separate entity.

The evidence of record suggests the possibility that the petitioner and foreign entity's proposed "joint venture" would be a temporary business enterprise, based on an unregistered signed agreement alone, that would not be established as a legal entity and would not otherwise grant the foreign entity any ownership interest in the petitioning company. At best, the record suggests that the proposed joint venture simply had not yet been formed as a legal entity at the time of filing. In either case, the petitioner has not established that it had a qualifying relationship at the time of filing the petition, and the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

#### IV. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.