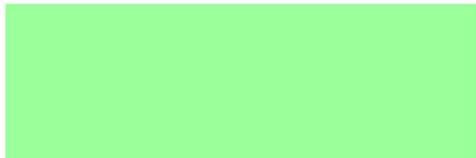


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

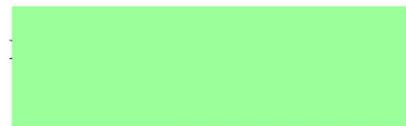


U.S. Citizenship
and Immigration
Services

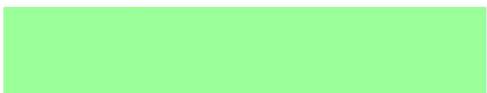
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DATE: **JAN 28 2014** OFFICE: NEBRASKA SERVICE CENTER

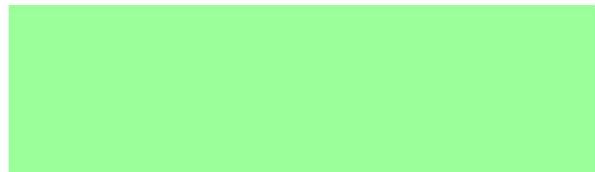


IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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
Chief, Administrative Appeals Office

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

The petitioner describes itself as a construction company. It seeks to permanently employ the beneficiary in the United States as an engineering manager. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹

The director's decision denying the petition concludes that the beneficiary did not possess the minimum sixty months of experience in the job offered, as required to perform the duties of the offered position by the priority date.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).² The priority date of the petition is December 23, 2011.³

Part H of the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree in civil engineering, electrical engineering, and other related field.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: The 60 months of experience must be in the engineering field.

Part J of the labor certification states that the beneficiary possesses a bachelor's degree in civil engineering from [REDACTED] completed in 1990. The record contains a copy of the beneficiary's civil engineering diploma and transcripts from [REDACTED] issued in 2000. The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] on February 16, 2000.

¹ Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

² See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2).

³ The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

The evaluation states that the beneficiary's degree of Bachelor of Science in Civil Engineering is the equivalent of a Bachelor of Science in Civil Engineering granted by a regionally accredited college or university in the United States.

Part K of the labor certification states that the beneficiary possesses the following relevant employment experience:

- Civil Engineer with [REDACTED] from September 13, 2007 until November 23, 2011.
- Civil Engineer with [REDACTED] in California from June 25, 2004 until July 30, 2007.

No other experience is listed. The beneficiary and petitioner signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The director's decision denying the petition found that the record did not contain enough evidence to overcome inconsistencies in the record concerning the beneficiary's employment experience. The director found that the petitioner did not establish the beneficiary's five years of prior work experience as required in the labor certification. On appeal, the petitioner states that the beneficiary's work experience with [REDACTED] establishes the beneficiary's work experience of five years as required in the approved labor certification.

The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.⁴ The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁵

II. LAW AND ANALYSIS

The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

⁴ See 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

⁵ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁶ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the

⁶ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

Eligibility for the Classification Sought

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, the petitioner claims that the beneficiary may be classified as an advanced degree professional based on a foreign equivalent degree to a U.S. bachelor's followed by at least five years of progressive experience in the specialty.

The beneficiary has earned a Bachelor's Degree in Civil Engineering from Lyceum of the Philippines on April 17, 1988. The beneficiary's Bachelor Degree represents attainment of a level of education comparable to a bachelor's degree in the United States. We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and

Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is “a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world.” <http://www.aacrao.org/About-AACRAO.aspx> (accessed January 27, 2014). Its mission “is to serve and advance higher education by providing leadership in academic and enrollment services.” *Id.* According to the registration page for EDGE, EDGE is “a web-based resource for the evaluation of foreign educational credentials.” <http://edge.aacrao.org/info.php> (accessed January 27, 2014). Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.⁷ If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁸

EDGE states that the Bachelor of Arts/Science/Commerce degree in the Philippines “represents attainment of a level of education comparable to a bachelor's degree in the United States.” <http://edge.aacrao.org/country/credential/bachelor-of-artssciencecommerce-etc?cid=single> (accessed January 27, 2014).

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

As noted by the director, the record does not contain an employment verification letter from [REDACTED]. On appeal, the petitioner states that the AAO should utilize the statement of [REDACTED].

⁷ See *An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

⁸ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign “baccalaureate” and foreign “Master's” degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

Engineers indicating its intention to employ the beneficiary; the employment contract; the approved Form I-129 petition of [REDACTED] on behalf of the beneficiary; and the beneficiary's IRS Form W-2 from RP Engineers to establish his experience as a civil engineer. The record contains an employment contract from [REDACTED] letterhead stating that the company would employ the beneficiary as a Civil Engineer beginning July 25, 2003. The current record does not contain a copy of a nonimmigrant petition filed by [REDACTED]. On appeal the petitioner submits IRS Forms W-2 for 2004, 2005, and 2006 indicating that [REDACTED] paid the beneficiary \$7,092.50, \$41,725.00, and \$4,000.00 respectively. These forms corroborate the beneficiary's employment with [REDACTED] but the varying wages do not indicate three years of full-time employment. Nor may the Forms W-2 substitute for the evidence prescribed by regulation. The evidence does not meet the requirements for establishing work experience at 8 C.F.R. § 204.5(1)(3). Nor has the petitioner established the need for secondary evidence to establish the beneficiary's work experience with [REDACTED].

The record contains an experience letter from [REDACTED] letterhead stating that the company employed the beneficiary as a Civil Engineer/structural designer from July 2007 until December 2010. The letter is dated January 11, 2011.⁹ The letter does not state that the job was full-time. As noted by the director, evidence submitted by the petitioner and the beneficiary in a previous labor certification filed by [REDACTED] establishes that the beneficiary was employed only part-time with [REDACTED]. On February 5, 2008, both the beneficiary and the president of the petitioner signed under penalty of perjury that the beneficiary was employed by [REDACTED] on a part-time basis (20 hours per week).¹¹ In the Form ETA 9089 filed in support of the current petition, the petitioner's president and the beneficiary signed under penalty of perjury on May 4, 2012 that [REDACTED] employed the beneficiary in a full-time capacity (40 hours per week).¹²

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in

⁹ The letter from [REDACTED] conflicts with the information on the labor certification that states that the beneficiary qualifies for the offered position based on full-time experience as a Civil Engineer with [REDACTED] from September 13, 2007 until December 23, 2011.

¹⁰ [REDACTED], a separate construction company from the petitioning entity in this case, is owned 100% by the president and sole owner of the instant petitioner, [REDACTED]. The petitioner, [REDACTED] was established on September 27, 2010. Had the petitioner trained the beneficiary while working for [REDACTED], such employment experience could not be considered as qualifying under the DOL regulation at 20 C.F.R. § 656.17.

¹¹ Information obtained from ETA Form 9089 (ETA Case Number: [REDACTED]), an approved labor certification application filed by the petitioner's president and incorporated into the current record.

¹² Information obtained from ETA Form 9089 (ETA Case Number: [REDACTED]) the approved labor certification application in support of the petition in this case.

fact, lies, will not suffice... Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

On appeal, counsel asserts that the director should consider the beneficiary's resume as objective evidence in supporting his claimed work experience. We find the resume to be self-serving and does not establish the beneficiary's work experience with evidence required by regulation at 8 C.F.R. § 204.5(g)(1) and (I)(3)(ii)(A). Further, the evidence in the resume conflicts with other evidence of record. The record contains a Form G-325 signed under penalty of perjury by the beneficiary on April 25, 2012. The beneficiary did not list his last employment abroad, and claims to have had two employers in the United States within the last five years. In contrast, the beneficiary's resume provides that he was employed abroad, and that he was employed by three different companies in the United States within the last five years. These inconsistencies make unreliable both the beneficiary's resume and his sworn statements on the Form G-325. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record also contains experience letters from two employers in the Philippines. An undated letter from [REDACTED] states that the beneficiary was employed as a project manager from January 12, 1998 until an unknown date. A second undated employment letter from [REDACTED] states that the beneficiary was employed from January 2, 1996 to June 27, 1996 as a field supervisor. Neither of these letters provides in detail the beneficiary's job duties nor does either letter state that the beneficiary worked as an engineering manager or in an engineering field. The letter from [REDACTED] does not give a term of employment. Further, the beneficiary did not claim either of the employers as working experience in the Form ETA 9089.¹³ In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the labor certification application lessens the credibility of the evidence and facts asserted. Because of the deficiencies noted the work experience letters from [REDACTED] do not establish any of the beneficiary's qualifying experience as an engineering manager or in the engineering field.

Upon review, we find it more likely than not that the beneficiary possesses fewer than five years of experience as an engineering manager or in an engineering field, as required in the approved labor certification.

The petitioner asserts that it should have been put on notice before the director denied the petition based on derogatory information that the petitioner was not aware of.¹⁴ The regulation at 8 C.F.R. §

¹³ The Form ETA 9089 requests the beneficiary to list all employment within the last three years and any relevant qualifying employment experience.

¹⁴ Both the president of the petitioner and the beneficiary signed both Forms ETA 9089 and thus each should reasonably have been aware of his attestations with respect to the relevant work experience gained with [REDACTED] and whether such experience was full-time or part-time.

103.2(b)(8) clearly states that a petition shall be denied “[i]f there is evidence of ineligibility in the record.” The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. Accordingly, the denial was appropriate. Further, the petitioner’s owner has had the opportunity on motion and on appeal to explain the inconsistencies and to clarify the hours the beneficiary worked at [REDACTED] and has not done so.

The petitioner also indicates that it was a violation of due process for the director not to have given it an opportunity to respond to the inconsistencies. There are no due process rights implicated in the adjudication of a benefits application. *See Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008); *see also Lyng v. Payne*, 476 U.S. 926, 942 (1986) (“We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.”).

On appeal, the petitioner, through counsel states the petitioner did not give contradicting or inconsistent job requirements in its two Forms ETA-9089, and that USCIS should not consider two different PERM Applications in making the instant decision. Contradictory evidence given by the petitioner’s president is relevant and germane to the credibility of the witness and the reliability of his testimony. No independent objective evidence of record resolves whether the beneficiary worked for [REDACTED] on a full-time or part-time basis.¹⁵

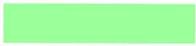
The petitioner has offered no additional evidence in support of its assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

The AAO affirms the director’s decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional worker under section 203(b)(2) of the Act.

III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification. Therefore, the beneficiary does not qualify for classification as a member of the professions holding

¹⁵ Information from the California Secretary of State indicates that the current status of [REDACTED] dissolved (accessed January 27, 2014). In any further filing, the petitioner should present evidence to establish that the beneficiary’s work experience with [REDACTED] was prior to the dissolution of the corporation.



an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed.

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.