



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 18 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on July 15, 2009. On the Form I-129 visa petition, the petitioner describes itself as an "education" business established in 1930. In order to employ the beneficiary in what it designates as a Spanish and social studies teacher position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on September 5, 2009, finding that its approval is barred by the numerical limitation, or "cap," on H-1B visa petitions. Specifically, the director determined that the petitioner had not established that it was a nonprofit entity related to or affiliated with an institution of higher education. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's two requests for evidence (RFEs); (3) the petitioner's responses to the RFEs; (4) the notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

I. INTRODUCTION

The primary issue in this matter is whether the beneficiary qualifies for an exemption from the Fiscal Year 2009 (FY09) H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. On April 8, 2008 U.S. Citizenship and Immigration Services (USCIS) issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY09, which covers employment dates starting on October 1, 2008 through September 30, 2009.

The petitioner filed the Form I-129 on July 15, 2009 and requested a starting employment date of July 30, 2009. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after April 8, 2008 and requesting a start date during FY09 must be rejected. However, in this matter the petitioner indicated on the Form I-129 that the beneficiary is a J-1 nonimmigrant alien who received a waiver of the two-year foreign residency requirement described in §§ 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C), and thus was exempt from the FY09 H-1B cap pursuant to section 214(g)(5) of the Act. Thus, the petition was adjudicated by the director as a cap exempt

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

case, even though the petition was filed after April 7, 2008.² The director denied the petition on September 5, 2009 and the decision is now before us on appeal.

Upon review, the petitioner has not established that it is exempt from the FY09 H-1B cap pursuant to section 214(g)(5) of the Act.

II. FACTUAL AND PROCEDURAL BACKGROUND

On the Form I-129 H-1B Data Collection Supplement (page 14), the petitioner checked the box for "Yes" in response to the question, "Are you a primary or secondary education institution?" for Part B (Fee Exemption and/or Determination), and checked the box for "Yes" in response to the question, "Is the beneficiary of this petition a J-1 nonimmigrant alien who received a waiver of the two-year foreign residency requirement described in section 214 (l)(1)(B) or (C) of the Act?" for Part C (Numerical Limitation Exemption Information).

In its letter of support dated June 23, 2009, the petitioner claimed that "it is a public educational institution consisting of three elementary and one middle school within the city of [REDACTED] California." It further claimed to offer primary through middle school education for grades kindergarten through eight, and claimed to have over 2,400 students and 250 staff members.

Regarding the proffered position, the petitioner stated that it required the services of the beneficiary as a middle school teacher, and claimed that she would teach language arts and social studies in grades six through eight. The petitioner identified the duties of the proffered position as follows:

[The beneficiary] will apply her knowledge of teaching in adapting the curriculum to the needs of each pupil. She will provide instruction, modify lessons to meet students' needs, prepare student progress reports, communicate regularly with faculty and parents, and foster an effective learning environment to develop strategies for increasing the level of physical activity in our school. She will also be required to attend faculty meetings, trainings, workshops and parent conferences.

In further support of the petition, the petitioner submitted a Labor Condition Application (LCA); copies of the beneficiary's resume, diplomas, and transcripts; a copy of the beneficiary's foreign academic credentials evaluation; a copy of a May 28, 2009 letter from the U.S. Department of State recommending the granting of the 212(e) waiver based on the beneficiary's no objection application; and the beneficiary's Form I-797 notice approving the waiver.

On July 18, 2009, the director issued a request for evidence. Specifically, the director

² The petition was initially filed with the California Service Center on June 26, 2009. The petition was rejected, however, because the numerical cap for FY09 had been reached as of the date of filing. The petitioner, however, was afforded the chance to resubmit the petition if it believed the rejection was erroneous by marking "exempted" on the petition and resubmitting it with the appropriate filing fees. Contending that the petition was cap exempt based on the beneficiary's waiver under §§ 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(1)(B) or (C), the petitioner refiled the petition with a copy of the beneficiary's I-797 Notice approving the waiver, and the petition was accepted for adjudication.

acknowledged the Form I-797 granting the beneficiary's Application for Waiver of the Foreign Residence Requirement filed on Form I-612. However, the director noted the record contained insufficient evidence to establish that the beneficiary was a J-1 nonimmigrant alien who received a waiver of the two-year foreign residency requirement described in section 214(l)(1)(B) or (C) of the Act. Specifically, the director requested "evidence to prove that the beneficiary received a waiver under Pub. L. 103-416 (Conrad Amendment)."³

In response, the petitioner submitted a letter dated August 5, 2009, in which it stated that it wished to "amend [its] declarations under the Numerical Limitation [] section." Specifically, the petitioner indicated that it was submitting a revised I-129W, changing its selection under Part C, (Numerical Limitation Exemption Information). In that regard, the petitioner submitted a new page 14 showing that the petitioner now answered "Yes" to the question, "Are you a nonprofit organization or entity related to or affiliated with an institution of higher education, as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a)?" Likewise, the form now indicated that the petitioner answered "No" to the question, "Is the beneficiary of this petition a J-1 nonimmigrant alien who received a waiver of the two-year foreign residency requirement described in section 214(l)(1)(B) or (C) of the Act?" which had previously been answered in the affirmative.

In the August 5, 2009 letter, the petitioner claimed that it maintained agreements with several universities for the training of intern teachers, and that "this is a cooperative program which is held on an ongoing basis." In support of this contention, the petitioner submitted two one-page documents entitled "Certificated Personnel," with the subheading "interns."

The director issued a second RFE on August 8, 2009, requesting additional evidence in support of the petitioner's contention that it was a nonprofit organization or entity related to or affiliated with an institution of higher education. In a facsimile response submitted on August 27, 2009, the petitioner submitted two identical copies of a letter from Dr. [REDACTED] Chair of the [REDACTED]. This letter stated as follows:

This is verification of a Memorandum of Understanding on file between your district (or county office) and the [REDACTED] Teacher Internship Program. We have interns in your district that are teaching under an Internship Credential that is issued by the Commission on Teacher Credentialing at the request of the [REDACTED] Teacher Internship Program. The term of this Memorandum of Understanding is from July 1, 2008 to June 30, 2011.

³ The Conrad 30 Waiver program allows J-1 medical doctors to apply for a waiver of the 2-year residence requirement upon completion of the J-1 exchange visitor program. Section 220 of the Immigration and Nationality Technical Corrections Act of 1994 (INTCA) established the Conrad State 20 Program (later changed to the "Conrad State 30 Program") to address the shortage of qualified physicians in medically underserved areas. See Pub.L. No. 103-416, 108 Stat. 4305. In 2004, Congress amended the Conrad State 30 Program to make the J-1 waiver physicians H-1B cap exempt. See Pub.L. No. 108-441, 118 Stat. 2630 (2004). On January 12, 2007, through enactment of Pub.L. 109-477, Congress extended the Conrad State 30 Program until June 1, 2008. The two-year extension became effective retroactively on May 31, 2006. The program continues to be extended and currently is set to expire on September 30, 2015.

No additional evidence, such as the Memorandum of Understanding referred to in the letter, was submitted.

On September 5, 2009, the director denied the petition, finding that the evidence of record was insufficient to establish that the petitioner was a nonprofit organization or entity related to or affiliated with an institution of higher education. On appeal, counsel contends that the denial was erroneous. Counsel asserts that the petitioner qualifies as a third party petitioner that will employ the beneficiary in a position directly related to the improvement of the qualifying institution, i.e., the training of new teacher graduates. Counsel resubmits several documents previously submitted in response to the RFEs, but submits no new evidence in support of the claims set forth in the appeal brief.

III. LAW AND ANALYSIS

As a preliminary matter, we will consider the petitioner's initial claim of exemption (i.e., that the beneficiary obtained a waiver of the two-year foreign residency requirement under Section 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C)).

The petition was initially rejected because it did not appear to be cap exempt under this section. The petitioner, however, resubmitted the petition by marking it "exempted," and maintained its contention that the beneficiary had obtained a waiver of the two-year foreign residency requirement and was thus cap exempt. The petitioner included copies of the Form I-797 approval notice and recommendation letter from the Department of State in further support of this contention.

As discussed above, section 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C), pertains only to individuals who meet the requirements of section 212(e)(iii) of the Act, 8 U.S.C. § 1182(e)(iii), who have obtained J-1 visas in order to receive graduate medical education or training. *See* section 212(e)(iii) of the Act, 8 U.S.C. § 1182(e)(iii). Although the beneficiary was previously in valid J-1 status and obtained a waiver of the 2-year foreign residence requirement, as demonstrated by the approval notice of the Form I-612 Application to Waive Foreign Residence Requirements, the beneficiary does not meet the requirements of section 212(e)(iii) of the Act, 8 U.S.C. § 1184(l)(2)(A), because the beneficiary is not an alien physician and did not receive graduate medical education or training while she was in J-1 status. When the director noted this deficiency in the first RFE and afforded the petitioner the opportunity to respond, the petitioner responded by submitting a "revised I129W" – currently referred to as the Form I-129 H-1B Data Collection Supplement – indicating that it was now claiming cap exemption as it was related to or affiliated with an institution of higher education. Notably, the petitioner does not claim that this was a clerical error, and the affirmative pursuit of the initial claim of eligibility under the J-1 foreign residency waiver section further affirms that this was not an oversight by the petitioner.

The regulation at 8 C.F.R. § 103.2(b)(8) does not require the issuance of an RFE, but instead makes such requests discretionary and allows for the denial of a petition without the issuance of an RFE. The regulation at 8 C.F.R. § 103.2(b)(8)(i) and (ii) states:

(i) Evidence of eligibility or ineligibility. If the evidence submitted with the application or petition establishes eligibility, USCIS will approve the application or petition, except that in any case in which the applicable statute or regulation makes the approval of a petition or application a matter entrusted to USCIS discretion, USCIS will approve the petition or application only if the evidence of record establishes both eligibility and that the petitioner or applicant warrants a favorable exercise of discretion. *If the record evidence establishes ineligibility, the application or petition will be denied on that basis.* (emphasis added)

(ii) Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

Upon reviewing the petition, the director determined that the beneficiary did not meet the requirements specified in section 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C) and afforded the petitioner the chance to respond with additional evidence. The beneficiary was clearly ineligible and did not meet the cap exemption criterion at section 214(l)(2)(A) of the Act, 8 U.S.C. § 1184(l)(2)(A) despite its noting on the initial petition that it was cap exempt. However, in issuing the discretionary RFE, the director inadvertently provided the petitioner with the opportunity to change its answers to Questions 2 and 4 and thereby make a material change to the petition. However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In this matter, the director erroneously accepted a material change to the petition after filing, and afforded the petitioner a second chance at adjudication under an alternative basis for eligibility. The director's actions were erroneous yet harmless, since the petitioner has failed to establish cap exemption under the newly claimed basis for exemption. Although the director's acceptance of this material change in response to the RFE constituted clear error, we will nevertheless address this additional basis for denial.

Section 214(g)(5)(A) of the Act, as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who "is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity"

For purposes of H-1B cap exemption for an institution of higher education, or a related or affiliated nonprofit entity, the H-1B regulations adopt the definition of institution of higher education set forth in section 101(a) of the Higher Education Act of 1965. Section 101(a) of the Higher Education Act of 1965, (Pub. Law 89-329), 20 U.S.C. § 1001(a), defines an institution of higher education as an educational institution in any state that:

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
- (4) is a public or other nonprofit institution; and
- (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

The governing statute, 8 U.S.C. § 1184(g)(5)(A), contains no definitions for determining if an employer qualifies as a "related or affiliated nonprofit entity" of an institution of higher education under 20 U.S.C. § 1001(a).

USCIS provided guidance in a June 2006 memorandum from Michael Aytes, Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, to Regional Directors and Service Center Directors, *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* HQPRD 70/23.12 (June 6, 2006) (hereinafter referred to as "Aytes Memo"). According to USCIS policy, the definition of related or affiliated nonprofit entity that should be applied in this instance is that found at 8 C.F.R. § 214.2(h)(19)(iii)(B). See Aytes Memo at 4 ("[T]he H-1B regulations define what is an affiliated nonprofit entity for purposes of the H-1B fee exemption. Adjudicators should apply the same definitions to determine whether an entity qualifies as an affiliated nonprofit entities [*sic*] for purposes of exemption from the H-1B cap").

Title 8 C.F.R. § 214.2(h)(19)(iii)(B), which was promulgated in connection with the enactment of ACWIA,⁴ defines what is a related or affiliated nonprofit entity specifically for purposes of the H-1B fee exemption provisions:

⁴ Enacted as Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-641.

An affiliated or related nonprofit entity. A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

By including the phrase "related or affiliated nonprofit entity" in the language of the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), without providing further definition or explanation, Congress likely intended for this phrase to be interpreted consistently with the only relevant definition of the phrase that existed in the law at the time of the enactment of AC21: the definition found at 8 C.F.R. § 214.2(h)(19)(iii)(B). As such, we find that USCIS reasonably interpreted AC21 to apply the definition of the phrase found at 8 C.F.R. § 214.2(h)(19)(iii)(B), and we will defer to the Aytes Memo in making our determination on this issue.

The petitioner must, therefore, establish that the beneficiary will be employed "at" an entity that satisfies the definition at 8 C.F.R. § 214.2(h)(19)(iii)(B) as a related or affiliated nonprofit entity of an institution of higher education under section 214(g)(5)(A) of the Act in order for the beneficiary to be exempt from the FY09 H-1B cap. Reducing the provision to its essential elements, we find that 8 C.F.R. § 214(h)(19)(iii)(B) allows a petitioner to demonstrate that it is an affiliated or related nonprofit entity if it establishes one or more of the following:

- (1) The petitioner is associated with an institution of higher education through shared ownership or control by the same board or federation;
- (2) The petitioner is operated by an institution of higher education; or
- (3) The petitioner is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.⁵

Similarly, the H-1B regulation at 8 C.F.R. § 214.2(h)(19)(iv) on fee exemption should be applied to determine whether the petitioner has established that the beneficiary will be employed at a "nonprofit" entity for purposes of cap-exemption determinations:

Non-profit or tax exempt organizations. For purposes of paragraphs (h)(19)(iii)(B) and (C) of this section, a nonprofit organization or entity is:

⁵ This reading is consistent with the Department of Labor's regulation at 20 C.F.R. § 656.40(e)(ii), which is identical to 8 C.F.R. § 214.2(h)(19)(iii)(B) except for an additional comma between the words "federation" and "operated". The Department of Labor explained in the supplementary information to its ACWIA regulations that it consulted with the former INS on the issue, supporting the conclusion that the definitions were intended to be identical. See 65 Fed. Reg. 80110, 80181 (Dec. 20, 2000).

- (A) Defined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6), 26 U.S.C. 501(c)(3), (c)(4) or (c)(6), and
- (B) Has been approved as a tax exempt organization for research or educational purposes by the Internal Revenue Service.

Turning to the director's basis for denial, we find, upon a complete and thorough review of the record of proceeding, that the petitioner has failed to submit sufficient evidence of a relationship to or affiliation with an institution of higher education as that term is defined by section 101(a) of the Higher Education Act of 1965. The petitioner implies that it has a memorandum of understanding with [REDACTED]. However, the only evidence submitted in support of this contention is a one-page letter from the Chair of the Department of Teacher Education, which claims that an internship program exists between [REDACTED] and the petitioner. This letter, by itself, does not establish an affiliation with or relationship to an institution of higher education as described above.

The record contains no other independent documentation of the existence of such a program. The record does not include the Memorandum of Understanding upon which the claimed relationship is based, and the record further contains no particular documentation outlining the nature of the internship program within the petitioner's middle school. The duties of the beneficiary, in addition, do not mention at any time that the beneficiary will mentor new teacher graduates or otherwise supervise interns under any specific and structured program. 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)). Moreover, counsel's claims on appeal are likewise insufficient; since they are not supported by any additional documentary evidence to establish an affiliation or relationship with [REDACTED]. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Aside from the unsupported claims of counsel and the petitioner, there is no evidence demonstrating that the petitioner is connected or associated with [REDACTED] through shared ownership or control by the same board or federation; operated by [REDACTED] or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

The petitioner has not provided sufficient evidence to establish that the instant petition seeks an H-1B visa for a nonimmigrant alien who will be employed by a nonprofit organization or entity related to or affiliated with an institution of higher education. We thus find that the evidence of record does not establish that this petition is exempt from the H-1B visa cap for this additional reason.

IV. BEYOND THE DECISION OF THE DIRECTOR

As the instant petition is numerically barred, we need not examine the issue of whether the beneficiary is qualified to perform the duties of a specialty occupation under the relevant statutory and regulatory guidelines. However, we note that the record contains insufficient evidence to establish that the beneficiary has the appropriate licensure to teach in the State of California. Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) requires evidence that the beneficiary possesses full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. Licensure is generally required for teaching positions in public schools. The record contains a certificate from CTC, Commission on Teacher Credentialing, awarding the beneficiary a "Clear Multiple Subject Teaching Credential." The certificate is not dated, nor does it appear to be a license or otherwise entitle the beneficiary to teach middle school classes in a public school. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

V. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the 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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative 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. at 128. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.