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Office of Administrative Appeals MS 2090
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FILE: WAC 08 208 51014 Office: CALIFORNIA SERVICE CENTER Date:

JAN 07 2010

IN RE: Petitioner:
Beneficiary:



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:

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).

102 *Michael F. Kelly*
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the 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 is an information technology/software business that seeks to employ the beneficiary as a project manager. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition, determining that the petitioner failed to demonstrate that it will employ the beneficiary in a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

In a July 22, 2008 letter submitted in support of the petition and request for extension, the petitioner described the proposed duties of the proffered project manager position as follows:

- Manage software projects involving planning, designing, and architecting applications.
- Interact with customers for requirement gathering and analysis.
Research solutions to business and technical problems to ensure optimum performance and compatibility.
- Lead developers in the design and development phase.

The record also includes a Labor Condition Application (LCA) submitted at the time of filing, listing the beneficiary's work location as Milpitas, California.

The petitioner also submitted copies of the beneficiary's education documents and employment letters along with a credential evaluation that states the beneficiary has the equivalent of a four-year bachelor's degree in computer information systems from an accredited college or university in the United States. According to the evaluation, the beneficiary has the equivalent of three years of university-level credit and five years and ten months of relevant employment experience (including two years and ten months of experience with the petitioner).

In an RFE, the director requested additional information from the petitioner, including an itinerary and copies of contracts between the petitioner and its clients for whom the beneficiary would be performing services, along with any statements of work/work orders, and/or service agreements for the beneficiary. The director also requested evidence pertaining to the beneficiary's status.

In response to the RFE, counsel for the petitioner stated that the petitioner is a public company with 65 employees in its Milpitas, CA office and 14,800 employees worldwide. Counsel included a copy of a Key Employment Agreement between the petitioner and the beneficiary dated November 3,

2004. The Key Employment Agreement states:

The company is engaged in the business of providing *computer consulting services*, software development and e-commerce activities to clients and customers in the United States and other countries around the world.

* * *

[T]he employment will be performed either at the Company's offices in Fremont, California or at any of the Company's offices in the United States. Employee may be required to relocate to other sites in the U.S. from time to time and Employee agrees to comply with such relocation requirements as instructed by Company.

(Emphasis added.)

The copies of the Form W-2 provided by counsel indicate that the beneficiary lived in Fremont, CA in 2001, 2002, 2003, 2005, and 2006. The 2004 Form W-2 for the beneficiary indicates that he lived in Florham Park, NJ. The 2007 Form W-2 indicates that the beneficiary lives in Berkeley, CA as does the Form G-28. The documentation provided by counsel evidences that the beneficiary's salary has met or exceeded the proffered wage of \$100,000 per year listed in the petition. However, the Key Employment Agreement and the Forms W-2 also indicate that the beneficiary has performed work at more than one location in the past and is likely to do so again. Moreover, as it is stated in the Key Employment Agreement that the petitioner's business is to provide computer consulting services and other software development and e-commerce activities to clients and customers, it appears that the substantive nature and the consequent educational requirements of the job duties to be performed by the beneficiary are determined by work generated through contracts with clients, whether or not such duties are actually performed in the petitioner's offices in Milpitas, CA.

The director denied the petition on the basis that the petitioner had not provided valid contracts or other documentation between itself and its clients demonstrating a need for the beneficiary to perform duties in a specialty occupation.

On appeal, counsel reiterates the beneficiary's generic duties as provided in the petitioner's support letter, but does not provide any details with respect to the project(s) on which the beneficiary will work or the duties that the beneficiary will perform. Counsel asserts that this position is closest to that of an Engineering Manager in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, but does not provide sufficient detail with respect to the duties the beneficiary will perform or information about the people the beneficiary will manage, including their degrees, in order to make a comparison to the *Handbook's* section on Engineering Managers.

On appeal, counsel also states, "Lastly, the petitioner has complete control over the work or projects assigned to the beneficiary whether they are being done in-house at the petitioner's place of business or at the customer's site." (Emphasis added.) In other words, the beneficiary may work at locations, including client sites, other than the petitioner's offices in Milpitas, CA. This assertion by counsel

that the beneficiary may be assigned to work at different locations as well as the Key Employment Agreement between the petitioner and the beneficiary contradict the information that the petitioner indicated in the Form I-129 and LCA, namely, that the petitioner would employ the beneficiary at its offices in Milpitas, CA for the duration of the petition.

The AAO will first consider whether the proffered position is a specialty occupation. Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related

provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In addressing whether the proposed position is a specialty occupation, the AAO agrees with the director’s determination that the record is devoid of documentary evidence as to where and for whom the beneficiary would be performing his services, and therefore whether his services would actually be those of a project manager.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner’s descriptions of the position and its underlying duties correspond to occupational descriptions in the *Handbook*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work’s content.

On appeal, counsel claims that the beneficiary will be working at the petitioner’s offices in Milpitas, CA, unless he is required to work at the client work location. However, in its response to the RFE and in support of the appeal, the petitioner does not provide any information about specific projects upon which the beneficiary will work; the substantive nature of actual project work that the beneficiary will perform at the petitioner’s headquarters or any other location; or contracts with client orders for work to be done that covers the period of employment requested in the petition. There are no work orders, no statements of work, and no work itinerary with respect to the proposed employment of the beneficiary. Without documentary evidence to support the claim, the assertions

of the petitioner 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).

Counsel's brief in support of the appeal seeks to distinguish *Defensor*, 201 F.3d 384, by arguing that the petitioner is not a contractor. However, as mentioned above, the record does not contain a detailed description of the beneficiary's actual daily duties. The petitioner initially offered an overview of the occupation of a project manager without detailing the actual duties the beneficiary would perform in the proffered position. The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, a petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. In this matter, the petitioner has not provided consistent evidence demonstrating that the beneficiary would work in-house or on a project for a particular client. The record does not contain evidence of the actual duties comprising the beneficiary's services for the petitioner or an end-user client or clients. Thus, USCIS is unable to determine whether the proffered position incorporates the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

The petitioner in this matter has failed to provide a definitive description of the duties the beneficiary would perform for the ultimate end-user of the beneficiary's services. The record does not provide sufficient information to determine whether the proposed position would include duties that require a bachelor's degree in a specific discipline. As the record does not contain documentation that establishes the specific duties the beneficiary would perform, the AAO is unable to analyze whether the duties of the proposed position would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

In that the record does not offer a comprehensive description of the duties the beneficiary would perform, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a detailed listing of the duties the beneficiary would perform under a contract existing when the

petition was filed, the petitioner has not established that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither has the petitioner satisfied the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline.

With respect to the Memorandum from Louis D. Crocetti, Jr., Associate Commissioner to Service Center Directors (November 13, 1995) and the Michael L. Aytes Internal Memorandum (Dec. 29, 1995) mentioned by counsel on appeal as a reason for not submitting copies of contracts or an itinerary, unpublished and internal opinions can not be cited as legal authority and they are not precedent or binding on USCIS. *See* 8 C.F.R. § 103.3(c) (types of decisions that are precedent decisions binding on all USCIS officers). Courts have consistently supported this position. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that legacy Immigration and Naturalization Serviced (INS) memoranda merely articulate internal guidelines for the agency's personnel; they do 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"); *Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to legacy INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing a legacy INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring substantive legal benefits upon aliens or binding the INS); and *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law"). Further, the Aytes memo qualifies its guidance as being subject to the exercise of the adjudicating officer's discretion. This is evident in the memo's statements that the itinerary requirement has been met "[a]s long as the officer is convinced of the bona fides of the petitioner's intentions with respect to the alien's employment," and that "[s]ervice officers are encouraged to use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien."

In addition, the memoranda must not be interpreted as countermanding or contradicting the regulations authorizing USCIS to request additional documentation. Under 8 C.F.R. § 103.2(b)(8)(ii), "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 time as determined by USCIS." (Emphasis added). Title 8 C.F.R. § 214.2(h)(9)(i) also states, "The director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."

Moreover, while the Aytes memorandum broadly interprets the term "itinerary," it provides USCIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. The petitioner in this matter initially indicated that the beneficiary would work at its

offices in Milpitas, CA, but the Key Employment Agreement provided in response to the RFE as well as additional documentation submitted and statements made by counsel indicate that the beneficiary may work at other offices of the petitioner or at client sites. 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).

Counsel also argues on appeal that the position of project manager is always a specialty occupation. However, the AAO need not address the issue of whether the position of project manager is always a specialty occupation, because the issue that must be addressed first is whether sufficient evidence was provided that demonstrates whether the work to be completed by the beneficiary entails the performance of duties that correspond with the description of a project manager. As the record does not contain sufficient evidence of the specific duties the beneficiary would perform or the project(s) on which the beneficiary would work, the AAO cannot analyze whether his placement is related to the provision of a product or service that requires the performance of the duties of a project manager, or any other position, at a specialty occupation level. As discussed earlier, the petitioner did not provide any copies of contracts with clients or an itinerary for the beneficiary, even though the evidence submitted indicates that the beneficiary will work on projects at either the petitioner's offices or client sites pursuant to client contracts. Without this information, the AAO cannot analyze whether the vague and generic duties provided by the petitioner would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, it cannot be determined what the actual proffered position is in this matter and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. However, beyond the decision of the director, the AAO notes that, in any event, the credential evaluation submitted, which is based on both the beneficiary's academic background and work experience, did not demonstrate that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C) because the record does not contain evidence that the evaluator, [REDACTED] Computer Science Department at Seattle Pacific University (SPU), is an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. § 214.2(h)(4)(iii)(D). For this reason also, the petition will be denied.

The record includes a letter from the SPU Provost dated January 2, 2001, who states that SPU faculty have the authority to grant credit for training or work experience. However, the letter does not state that SPU has a program for granting credit based on work experience. Further, as the Provost's letter predates the evaluation by more than a year, its accuracy and applicability at the time of the evaluation is not established. Thus, the evaluator's conclusion is not supported by the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D). Also, an educational evaluation agency is deemed competent to evaluate academic credentials only. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

Moreover, although the evaluator concludes that the beneficiary's foreign education and professional work experience are the U.S. equivalent of a bachelor's degree in computer information systems, the petitioner has not presented a sufficient factual basis to support the evaluator's conclusions regarding this equivalency. The letters from the beneficiary's foreign employers referred to in the evaluation were not submitted. Therefore, the record contains insufficient evidence in support of the beneficiary's assertions regarding his employment experience. Thus, the evaluator's conclusion that the beneficiary's foreign education combined with his work experience are the U.S. equivalent of a bachelor's degree in computer information systems carries no weight in these proceedings. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Also beyond the decision of the director, the AAO also finds that the petitioner did not establish eligibility at the time the petition was filed. The LCA and Form I-129, which list the proffered position's location as being at the petitioner's offices in Milpitas, CA for the duration of the petition, do not correspond with the Key Employment Agreement provided by the petitioner as supporting documentation in response to the RFE or the statement by counsel on appeal that the beneficiary will work either at the petitioner's offices or at a client site. The petitioner cannot assert that it will pay the beneficiary the prevailing wage for the geographical area where the beneficiary will be employed as listed in the submitted LCA if the petitioner does not yet know where the beneficiary will perform the work. As such, the petitioner cannot establish that it has complied or will comply with the requirements of § 212(n)(1)(A)(i) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), as of the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). For this additional reason, the petition cannot be approved.

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, it would constitute material error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g.*

Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Here, that burden has not been met.

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