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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 05 2010

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:

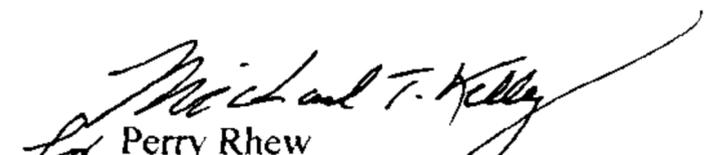
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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 consulting firm that seeks to employ the beneficiary as a programmer analyst. Accordingly, the petitioner 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 had failed to establish that: (1) it meets the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) it submitted a valid labor condition application (LCA) for all locations; and (4) the proffered position is a specialty occupation.

On appeal, counsel for the petitioner submits Form I-290B accompanied by a brief and additional evidence.

In a letter of support dated December 1, 2008, the petitioner claimed that it is a leading information technology and management consulting firm which currently employed 30 people. It further claimed that it "provides high technology computer services for a wide range of hardware environments and software applications." It stated that it would employ the beneficiary in the position of programmer analyst at an annual salary of \$51,251, and that she work onsite at the petitioner's office in Rochester, Michigan for the duration of the petition.

On December 9, 2008, the director issued a request for evidence (RFE). Specifically, the director asked the petitioner to submit additional information with regard to the petitioner's organization, including the current employment status of personnel working under H-1B or L-1 visas. Additionally, the director requested clarification regarding the nature of the petitioner's business structure, such as whether it contracted personnel to clients or third-party clients. The petitioner was asked to submit copies of all contracts and other documentation relevant to this inquiry, as well as additional employer information such as tax returns, lease agreements, and photographs.

In a response dated January 7, 2009, the petitioner, through counsel, addressed the director's queries. The petitioner submitted an abundance of documentation, including quarterly wage reports and wage and tax statements in support of the contention that it was employing the beneficiary as well as other personnel. The petitioner also submitted an offer of employment letter to the beneficiary, as well as an employment contract and overview of the beneficiary's in-house project which the beneficiary would perform for the duration of the petition.

The director found this evidence insufficient to establish eligibility for the benefits sought, and consequently denied the petition on January 20, 2009.

The first issue in the present matter is whether the petitioner has established that it meets the regulatory definition of an intending United States employer or agent. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. §

214.2(h)(4)(ii) and 8 C.F.R. § 214.2(h)(2)(i)(F). Specifically, the AAO must determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

"United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

Upon review, the AAO finds that the totality of the evidence submitted in support of the particular relationship between this petitioner and this beneficiary, in the particular context of the work to which the beneficiary would actually be assigned and the indicia of the extent of the petitioner's control over the beneficiary's work performance, establishes that the petitioner was a United States employer within the meaning of section 101(a)(15)(H)(i)(b) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii). Therefore, the issue of the petitioner's standing to file this H-1B petition is resolved in the petitioner's favor. Accordingly, the director's finding to the contrary is hereby withdrawn and no longer exists as a ground for denying this particular petition.

A related issue cited by the director in denying the petition is whether a valid LCA for all work locations of the beneficiary was submitted with the petition, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). The director noted that the LCA listed the beneficiary's work location as Rochester, Michigan. As discussed above, the AAO has determined that the petitioner qualifies as the beneficiary's employer. All documentation submitted into the record indicates that the beneficiary will work onsite at the petitioner's offices in Rochester, Michigan. Therefore, the LCA identifying Rochester, Michigan, as the certified work location is valid, that is, it corresponds with the location where the beneficiary would work. Consequently, the director's finding to the contrary on this issue is also withdrawn and no longer exists as a ground for denying this particular petition.

The petition may not be approved, however, as the record does not establish that the petitioner will employ the beneficiary in a specialty occupation.

Section 214(i)(1) of 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields 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 [2] 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, the 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), 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. To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

In this matter, the petitioner claims that the beneficiary will work as a programmer analyst. Regarding the proposed position, the petitioner submitted the following overview of the position in a letter dated December 1, 2008:

The Programmer Analyst analyzes the data processing requirements to determine the computer software, which will best serve those needs. Thereafter, she will design a computer system using that software, which will process the data in the most timely and inexpensive manner, and implements that design by overseeing the installation of the necessary system software and its customization to the unique requirements. The actual computer programming will be performed with the assistance of the programmers.

Throughout this process, the Programmer Analyst must constantly interact with the management, explaining to it each phase of the system development process, responding to its questions, comments, and criticisms, and modify the system so that the concerns raised are adequately addressed. Consequently, the Programmer Analyst must constantly revise and

revamp the system as it is being created to respond to unanticipated software anomalies heretofore undiscovered, to the extent that occasionally the system finally created bears seemingly little resemblance to that which was initially proposed. [The beneficiary] will be involved in the designing and development of the application. [The beneficiary's] primary responsibilities will include: participation in various stages of the software development life cycle, from requirements phase to deployment; responsible for gathering and analyzing requirements and development of the software; and interaction with management on a regular basis for progress updates.

Under the heading of Day-to-Day Responsibilities, the petitioner provided the following generalized breakdown of the beneficiary's time:

Analysis of software requirements	25%
Evaluation of interface feasibility between hardware and software	10%
Software system design (using scientific analysis and mathematical models to predict and measure design consequences and outcomes)	30%
Unit and integration testing	25%
System installation	5%
Systems maintenance	5%

The petitioner further claimed that the minimal educational qualification for entry into the position was a Bachelor's degree in Computer Science, Science, Engineering, a related analytic or scientific discipline, or its equivalent in education or work-related experience.

In response to the RFE, the petitioner submitted an overview of the position dated December 12, 2008, which restated many of the general duties cited above. It further claimed that the beneficiary would work on an in-house project entitled Virtual Pharma Exhibition, and provided a brief overview of the project. These documents remained somewhat vague in their description of the duties of the proffered position.

The director denied the petition, finding that absent end contracts with the petitioner's clients, the director could not determine the nature of the proposed duties of the beneficiary and thus could not determine if the proffered position was a specialty occupation. On appeal, counsel asserts that the petitioner is not outsourcing the beneficiary, and claims that adequate evidence in support of this contention was submitted. As discussed above, the AAO concurs with counsel's assertions and finds that the record demonstrates that the beneficiary will work in-house as a programmer analyst. Upon review of the record, however, the petitioner has

established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by USCIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The position of programmer-analyst is included in the *Handbook* discussion of computer systems analyst positions. Pertinent to the duties of such positions, the *Handbook* states:¹

They may design and develop new computer systems by choosing and configuring hardware and software, or they may devise ways to apply existing systems' resources to additional tasks.

* * *

[S]ystems analysts consult with an organization's managers and users to define the goals of the system and then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and a variety of accounting principles to ensure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

* * *

¹The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 -- 2011 edition available online, accessed September 3, 2010.

[S]ystems analysts oversee the implementation of the required hardware and software components. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then they work with programmers to "debug," or eliminate errors, from the system. Systems analysts who do more in-depth testing may be called *software quality assurance analysts*. In addition to running tests, these workers diagnose problems, recommend solutions, and determine whether program requirements have been met. After the system has been implemented, tested, and debugged, computer systems analysts may train its users and write instruction manuals.

* * *

In some organizations, *programmer-analysts* design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks.

Pertinent to the education and training required for those positions, the *Handbook* states:

When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

As evident above, the *Handbook* indicates that employers often seek or prefer at least a bachelor's degree level of education in a technical field for programmer analyst positions. In light of the range of educational credentials indicated by the *Handbook* as associated with the programmer analyst occupation, however, the *Handbook* does not indicate that programmer analyst positions normally require a bachelor's degree in a *specific specialty*. Thus, demonstrating that the proffered position is, in fact, a programmer analyst position is not in itself sufficient to demonstrate that it qualifies as a specialty occupation.

As identifying the proffered position as a programmer analyst position is not sufficient to establish the type and level of educational achievement actually required for its performance, it is incumbent on the petitioner to provide sufficient evidence to establish not only that the beneficiary would perform the services of a

programmer analyst for the period specified in the petition, but also that the beneficiary would do so at a level requiring the theoretical and practical application of at least a bachelor's degree level of highly specialized knowledge in a computer-related specialty. As will now be discussed, the petition has failed on the latter count. As evident from the quotations from the petitioner's letter earlier in this decision, the descriptions of the duties comprising the proffered position are only described in terms of generalized and generic functions. The AAO finds that it is not self-evident that the practical and theoretical applications of specialized knowledge required to perform such functions cannot be attained by work experience, vendor courses, training at vocational institutions, community college courses, or a combination thereof that would not qualify as an objective equivalent of at least a bachelor's degree in a specific specialty, and, further, that the documentation in the record of proceeding does not cure this deficiency.

As the evidence of record does not establish that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for programmer analyst positions. In fact, the petitioner's support letter confirms that it will accept a wide array of degrees, or a combination of education and experience, for entry into the proffered position. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst positions that can be performed by persons without a specialty degree or its equivalent.

The petitioner has not submitted documentation of its hiring practices. Consequently, the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The petitioner has not related the listed duties to its information technology consulting business beyond what is normally encountered in the occupational field. The petitioner has not shown, in relation to its business, that the duties of the proffered position are so complex or unique that they can be performed only by an individual with a degree in a specific specialty. Again, the *Handbook* reveals that the duties of the proffered position would be performed by an occupation that does not require a specific baccalaureate degree as a minimum for entry into the occupation. Thus, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Based on the above, the AAO is precluded from finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Because the petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation, the petition was correctly denied. That basis for denial has not been overcome on appeal, and the appeal will be dismissed and the petition denied for that reason.

The final issue is whether the petitioner is in compliance with the terms and conditions of employment. Specifically, the director found that the petitioner made inconsistent and contradictory claims regarding its employment of and wages paid to one of its H-1B employees, [REDACTED]

The director notes that the petitioner has failed to compensate this H-1B employee as claimed. The director found discrepancies between the petitioner's payroll records and the actual wages paid and hours worked by this employee. The AAO finds that the petitioner's explanation on appeal - that the person in question was on a "voluntary leave of absence" - does not effectively address or overcome the issue raised by the director. The AAO notes, first, that the petitioner has not supplemented the record with documentation sufficient to corroborate its claim. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Second, a "voluntary" leave of absence will not excuse a petitioner from its obligation to continue paying an H-1B beneficiary during his or her term of employment unless that leave was not occasioned by the petitioner's inability to provide work for the beneficiary. See 20 C.F.R. § 655.731 (the DOL regulation containing the rules governing an H-1B petitioner's wage obligations).

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOI*, 381 F.3d 143, 145 (3d Cir. 2004). In the exercise of this *de novo* review function, the AAO identified a significant issue not addressed by the director. Beyond the decision of the director, it should be noted that the evidence in the record demonstrates that the beneficiary resides in Herndon, Virginia. Specifically, the offer letter addressed to her on November 21, 2008, the petitioner's statement on Form I-129, and a copy of her paycheck all indicate that

she resides in Virginia. Most importantly, the copy of the beneficiary's paycheck contained in the record is dated February 5, 2009, nearly three months after the beneficiary was to have commenced her employment with the petitioner in accordance with the employment contract. This is significant, since the petitioner claims that the beneficiary works onsite for the petitioner at its headquarters in Rochester, Michigan. 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). 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. *Id.* at 591.

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. The appeal will be dismissed and the petition denied.

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