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



**U.S. Citizenship  
and Immigration  
Services**

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DATE: **JUL 23 2011** Office: CALIFORNIA SERVICE CENTER FILE:

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:**

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 \$630. 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,

*for*   
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 engaged in the import and sale of coated abrasives and seeks to employ the beneficiary as a market research analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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, finding that the position was not a specialty occupation.

On appeal, counsel for the petitioner submits arguments on Form I-290B along with additional documentary evidence in support of the contention that the proffered position is a specialty occupation.

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

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 [1] 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 [2] 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 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 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 (5<sup>th</sup> 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations 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, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards,

but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In an April 3, 2009 letter, the petitioner explained that with a general slowdown in the construction market, competition among companies in the petitioner's industry has become fierce. The petitioner contended that, as a result, it seeks to hire the beneficiary for a three-year period in order to "combat competitors and strengthen its marketing efforts." Regarding the proffered position, the petitioner provided the overview of duties associated with the proffered position:

As a market research analyst, [the beneficiary] will gather data in foreign markets, research market information like current and projected demand, technical characteristics, strengths and weaknesses of competitors, financing, prices and costs, performance requirements, regulations by local governments in construction industry, potential import restrictions and conditions, and business cooperation with companies in the United States. He will also study distribution systems in the United States market, anticipate problems in dealing with such systems, and formulate solutions. He will analyze the data about abrasive products, particularly for construction industry, formulate marketing strategies, and recommend short-term and intermediate-term business plans for management to maximize profits and stability and minimize risks for employer. He will study projected long-term changes in the way business is done in construction industry and related other industries, anticipate long-term trend, and formulate solutions. He will draw up detailed marketing campaign and recommend it to the employer. In addition, he will monitor information on several suppliers of abrasive products to request changes in prices and quality characteristics of the abrasive products that [the petitioner] purchases from the manufacturer in Korea.

The petitioner concluded by stating that the kind of work the beneficiary will perform requires at least a bachelor's degree in economics or business administration.

In a May 1, 2009 RFE, the director requested additional information. Specifically, the director requested more detailed evidence demonstrating that the proffered position is a specialty occupation, including but not limited to a more detailed description of the proffered position and information pertaining to the petitioner's business, its hiring practices, and its organizational chart.

In response, the petitioner addressed the director's queries in a letter dated June 5, 2009. The petitioner provided the following updated description of the duties of the proffered position:

Gather data in markets in the United States and Canada, research market information like current and projected demand, technical characteristics, strengths and weaknesses of competitors, financing, prices and costs, performance requirements, regulations by local governments in construction industry, potential import restrictions and conditions, and business cooperation with companies in the United States to clearly understand the market and the company's current performance as well as to define any growth opportunities. Study

distribution systems in the United States and Canadian markets, anticipate problems in dealing with such systems, and formulate solutions. Analyze and interpret data about abrasive products, particularly for construction industry, forecast and track marketing and sales trends, formulate marketing strategies, and recommend short-term and intermediate-term business plans for management to maximize profits and stability and minimize risks for our company. Measure the effectiveness of marketing, advertising, and communications programs and strategies. Study projected long-term changes in the way business is done in construction industry and related other industries, anticipate long-term trend, and formulate solutions. Measure and assess customer and dealer satisfaction. Prepare reports of findings, illustrating data graphically and translating complex findings into written text. Draw up detailed marketing campaign and recommend it to our company. Monitor information on several competing suppliers of abrasive products to request changes in prices and quality characteristics of the abrasive products that our company purchases from the manufacturer in Korea. Monitor industry statistics and follow trends in trade literature.

The AAO notes that this updated description of duties essentially restates the duties as described in the petitioner's initial letter of support.

The petitioner also provided copies of job postings for what it claimed were parallel positions in similar organizations in support of the contention that the petitioner's degree requirement was common in the industry, as well as tax documents and invoices demonstrating the petitioner's financial history. The petitioner also submitted a copy of its job announcement for the proffered position, which included the above-referenced description of duties and indicated that candidate should have at least a bachelor's degree in business administration or economics, or the equivalent, but that a master's degree in business administration was preferred.

On July 9, 2009, the director denied the petition, determining that the petitioner had failed to establish that the proffered position was a specialty occupation. The director found that the proffered position was most akin to the occupation of a marketing manager, and set forth two bases for the denial: (1) the duties of the proffered position were not those of a market research analyst; and (2) the industry in which the beneficiary would be employed did not typically require the services of a market research analyst.

On appeal, counsel contends that the director's findings were erroneous, and states his arguments on the Form I-290B. Although documentary evidence is submitted in support of the appeal, a review of this documentation indicates that it was previously submitted into the record prior to adjudication.

In reviewing the record, the AAO observes that the critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or

higher degree, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty.

The petitioner claims that the proffered position is that of a market research analyst. To determine whether the duties of the proffered position support the petitioner's characterization of its proposed employment, the AAO turns to the 2010-2011 online edition of the *Handbook* for its discussion of market research analysts. As stated by the *Handbook*, the occupation of market research analyst is described as follows:

*Market and survey researchers* gather information about what people think. Market research analysts help companies understand what types of products people want, determine who will buy them and at what price. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need by designing surveys to assess consumer preferences. While a majority of surveys are conducted through the Internet and telephone, other methods may include focus group discussions, mail responses, or setting up booths in public places, such as shopping malls, for example. Trained interviewers usually conduct the surveys under a market research analyst's direction.

Market opinion research has contributed greatly to a higher standard of living as most products and services consumers purchase are available with the aid of market research. By making recommendations to their client or employer, market research analysts provide companies with vital information to help them make decisions on the promotion, distribution, and design of products or services. For example, child proof closures on medicine bottles exist because research helped define the most workable design; and the growing variety of ready to cook meals, such as microwaveable soups and prepackaged meat products, exist because of increasing public demand for fast and convenient meals. The information also may be used to determine whether the company should add new lines of merchandise, open new branches, or otherwise diversify the company's operations. Market research analysts also help develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways based on their knowledge of the consumer being targeted.

The director found that, based on the description of the occupation of market research analyst, such analysts compile and analyze market data, but do not act upon that data. Noting that the beneficiary's duties within the structure of the petitioner's company require such actions, the director concluded that, in essence, the proffered position was more akin to that of a marketing manager. The AAO agrees with this finding, and will discuss this issue in further detail below.

It should first be noted, however, that even if the proffered position were deemed that of a market research analyst, market research analyst positions do not comprise an occupational group which categorically includes

only positions that normally require a baccalaureate or higher degree, or its equivalent, in a specific specialty. Thus, the proffered position's inclusion within the market research analyst occupation would not be sufficient in itself to establish the position as a specialty occupation by application of the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). In this regard, the *Handbook's* section pertaining to the educational requirements for market and survey researchers states:

While a bachelor's degree is often sufficient for entry-level market and survey research jobs, higher degrees are usually required for advancement and more technical positions. Strong quantitative skills and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data also are important for advancement.

***Education and training.*** A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

The *Handbook* does not indicate that a bachelor's degree or higher in a specific specialty or its equivalent is the normal minimum requirement for entry into the position. While the *Handbook* indicates that a bachelor's degree is the most significant source of postsecondary education for persons employed in market and survey research jobs, no specific specialty is identified as the area in which the degree must be obtained. Therefore, even if the proffered position were deemed to be that of a market research analyst, based on duties including gathering information on competitors, the proffered position would not be considered a specialty occupation.<sup>1</sup>

That being said, upon review of the totality of the duties described in the record of proceeding, the AAO finds that, while the proffered position encompasses some of the duties of a market research analyst, the proffered position is most akin to that of a marketing manager as described in the *Handbook's* section pertaining to advertising, marketing, promotions, public relations, and sales managers.

The *Handbook* describes the occupational category of marketing manager as follows:

***Marketing managers.*** Marketing managers work with advertising and promotion managers to promote the firm's or organization's products and services. With the help of lower level managers, including *product development managers* and *market research managers*,

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<sup>1</sup> The AAO notes that the director based the denial in part on the conclusion that the petitioner's business operations lacked the organizational complexity to support the employment of a market research analyst. Since the petitioner's organizational complexity is not a decisive factor in this particular proceeding, the AAO withdraws this basis for denying the petition. The AAO also withdraws as a basis for denial the director's finding regarding the type of industry in which the beneficiary would be employed, as the *Handbook* states that market research analysts "are employed throughout the economy." Finally, it is noted that the director improperly concluded that the occupation of market research analyst is a specialty occupation which, for the reasons discussed above, is an improper but harmless conclusion, since it was not a basis of the denial in this matter. Nevertheless, as discussed above, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the director's decision to deny the petition shall not be disturbed.

marketing managers estimate the demand for products and services offered by the firm and its competitors and identify potential markets for the firm's products. Marketing managers also develop pricing strategies to help firms maximize profits and market share while ensuring that the firms' customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and they oversee product development.

As discussed above, the duties of the proffered position, which is identified as that of a market research analyst in a company engaged in the import and sale of coated abrasives, are most akin to the occupation of marketing manager. The petitioner claims that the main purpose of the beneficiary's research is to maximize potential markets and increase profits for the petitioner. While market research analysts typically gather statistical data for firms or companies and present their findings to those companies, the beneficiary is tasked with duties such as forecasting market trends, formulating marketing strategies, and recommending business plans.

The *Handbook* states as follows with regard to the educational requirements of this occupation:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs, but many employers prefer college graduates with experience in related occupations.

**Education and training.** For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

The *Handbook* clearly indicates that educational requirements vary for the position of a marketing manager. While it appears that a bachelor's degree in business administration is often preferred for entry into the field, the *Handbook* does not indicate that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the position. Upon review of the duties of the proffered position, the AAO cannot conclude that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in a specific specialty.

When a job, like that of a marketing manager, can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(A)(1) to require a degree in a specific specialty that is directly related to the proffered position. Since there must be a close correlation between the required

specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

The petitioner has therefore failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position of a market research analyst/marketing manager as described in the record of proceeding. Accordingly, the petitioner has not established 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 alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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)).

In this matter, the petitioner submits seven job postings from *www.careerbuilder.com* for market research analyst positions. As correctly noted by the director, six of the seven postings simply require a "four-year" degree, and do not specify a specific specialty in which the degree must be obtained. Moreover, the seventh posting, which requires a degree in finance or accounting, is advertised by [REDACTED] which claims to be the world's largest specialized financial recruitment service. This company, therefore. None of these postings, therefore, establish that a degree requirement in a specific discipline is common to the industry in parallel positions among similar organizations.

Under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a degree in a specific specialty can perform the duties associated with the position. The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist him in carrying out the duties of the proffered position; however, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed employment, and the AAO further finds that the requisite degree of complexity or uniqueness is not evident in the position or its constituent duties as described in this record of proceeding. The petitioner has thus failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The petitioner discusses the current state of the construction industry, thereby explaining the need for assistance in marketing its products. The petitioner, however, has not provided any evidence or claim that it has previously employed degreed individuals in the proffered position. As noted by the director, although the petitioner claims that all of its employees possess at least a bachelor's degree, it has failed to submit any documentary evidence corroborating this claim and that the asserted degrees were in a specific specialty directly and closely related to the performance requirements of the proffered position. 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)).

The record, therefore, does not document that the duties of the proffered position require a baccalaureate or higher level of education to perform them. The AAO notes that while a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. See *Defensor v. Meissner*, 201 F. 3d at 384. As noted above, however, the petitioner states that an individual with a general bachelor's degree in business administration can perform the duties of the proffered position. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The duties of the position described encompass routine marketing duties. While the petitioner claims that the duties of the proffered position are sufficiently complex, the record does not contain explanations or clarifying data sufficient to elevate the position to one that is so specialized and complex that the knowledge to perform these additional tasks is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO notes that the duties as described in the record of proceeding are broad and numerous and appear to span a variety of marketing functions. However, the AAO finds that, to the extent that they are described, the duties do not convey either the need for the beneficiary to apply a particular body of highly specialized knowledge in a specific specialty, or a usual association between such knowledge and the attainment of a particular educational level in a specific specialty. As the petitioner has not established that the proffered position's specific duties require the application of specialized and complex knowledge usually associated with the attainment of a baccalaureate degree or higher degree in a specific discipline, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the record of proceeding, the AAO determines that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.