

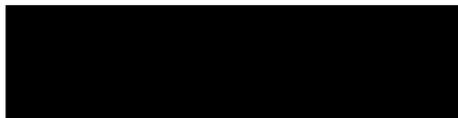
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



D2

Date: NOV 01 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)

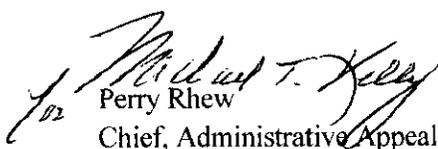
ON BEHALF OF PETITIONER: SELF-REPRESENTED

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,


Perry Rhew
Chief, Administrative Appeals Office

(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.

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 a particular position meeting a condition under 8 C.F.R.

The petitioner's CEO further stated, "The nature of [the beneficiary's] duties is highly specialized. This position requires a professional with a minimum of Bachelor's in Computers, Electrical or Electronics related field or equivalent." The petitioner's CEO revealed no other analysis that led to the conclusion that the proffered position requires a bachelor's degree in any subject.

Further, as was noted above, to qualify as a position in a specialty occupation, the proffered position must require a minimum of a bachelor's degree or the equivalent *in a specific specialty*. The petitioner's CEO offered no analysis that led to the conclusion that computers, and electrical or electronics-related fields, all taken together, delineate a specific specialty, as opposed to a wide array of subjects.

The failure of the petitioner even to allege that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty is a sufficient reason, in itself, to find that the petitioner has not demonstrated that the proffered position is a specialty occupation position, and sufficient reason, in itself, to deny the visa petition. However, the AAO will continue its analysis of the specialty occupation issue, in order to identify other evidentiary deficiencies that preclude approval of this petition.

In response to a request in the May 30, 2008 RFE, the petitioner submitted vacancy announcements it had placed for various positions. Those vacancy announcements include some newspaper classified advertisements that have been so reduced that they are illegible. They will not be further addressed.

One announcement is for multiple openings designated as programmer analyst positions. That announcement states, "Candidates should have a bachelor's degree or equivalent in a related field" It does not state what fields would be considered to be related to the position.

Two announcements are for software engineers, systems analysts, programmer analysts, computer and information systems managers, and database administrators. They state, "All positions require at least a bachelor's or equivalent" They do not indicate any specific specialty the degrees should be in.

A classified advertisement and an announcement taken from a job search website, both for programmer analyst positions, state "Requirements: Master's in computer science, EE, or related technical field."

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook* discusses the duties of programmer analyst positions in the section entitled Computer Systems Analysts. It states the following as to programmer analyst positions:

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

¹ The *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.

tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears elsewhere in the *Handbook*.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client-server applications, and multimedia and Internet technology.

Programmer analyst positions, then, combine the duties of a computer systems analyst with those of a programmer. The *Handbook* states the following about the duties of computer systems analysts:

To begin an assignment, systems 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.

When a system is approved, systems 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.

The *Handbook* discusses computer programmer positions in the section entitled Computer Software Engineers and Computer Programmers. It describes the duties of computer programmers as follows:

Computer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the *Handbook*.) The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.

Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the

coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use “programmer environments,” applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers’ productivity by eliminating some routine steps.

The duties of the proffered position, as described by the petitioner’s CEO are consistent with a blend of the duties of a computer systems analyst position and a computer programmer position. The AAO finds that the proffered position is a programmer analyst position. The *Handbook* describes the educational requirements of computer systems analysts, including programmer analysts, as follows:

Education and training. 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.

A preference for a bachelor’s degree is not a minimum requirement. A preference for a degree in “computer science, information science, applied mathematics, engineering, or the physical sciences” is certainly not a requirement of a degree in a specific specialty, as it is not apparent on their face – and the evidence in the record does not establish – that these academic disciplines share a core body of highly specialized knowledge in any specialty. Neither that section of the *Handbook*, nor any evidence in the record, suggests that programmer analyst positions categorically require a minimum of a bachelor’s degree or the equivalent in any specific specialty.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, the AAO will consider 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 specific 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 was noted above, the *Handbook* offers no support for the proposition that organizations similar to the petitioner in the petitioner's industry normally require a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence that a professional association of programmer analysts or computer systems analysts requires a minimum of a bachelor's degree or the equivalent in a specific specialty for entry. The record contains no letters or affidavits from other firms or individuals in the petitioner's industry. The record contains, in short, no evidence pertinent to the common requirements for programmer analysts in the petitioner's industry.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner is able to demonstrate that, although a more typical programmer analyst position may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the individual position proffered in the instant case is so complex or unique that it can be performed only by an individual with a degree.

Most of the duties of the proffered position are so abstractly phrased that distinguishing them from the duties of other programmer analyst positions is impossible. "Developing customer software," "Coding in programming languages," "Writing algorithms," "Preparing flowcharts," etc. are merely generic duties of typical programmer analyst positions. The only duty that is more concretely described, "Customizing functional modules on GUI mode," is not unique and provides no indication of complexity beyond the ken of a typical programmer analyst.

Further, as was noted above, the petitioner's CEO indicated that a degree in computers or in any electronics or electrical-related field would be a sufficient qualification for the proffered position, which is tantamount to an admission that it does not, in fact, require a minimum of a bachelor's degree or the equivalent in any specific specialty.

As the petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a minimum of a bachelor's degree or the equivalent in a specific specialty, it has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty for the position. The vacancy announcements provided and the petitioner's CEO's statement are the only evidence pertinent to the petitioner's recruitment or hiring practices.²

One announcement requires a master's degree in computer science, electrical engineering, or a related field. The AAO notes that computer science and electrical engineering do not delineate a specific specialty. That position does not require a minimum of a bachelor's degree or the equivalent in a specific specialty.

Two announcements for various computer-related positions, including programmer analyst positions, state that candidates for the positions "should have a bachelor's degree in a related field." Given that the previous announcement considered both computer science and electrical engineering to qualify one for such positions, the AAO cannot find that "a related field" denotes any specific specialty.

The remaining announcements state that all of the positions require "at least a bachelor's degree or equivalent," with no indication that the degree should be in any specific specialty.

As was observed above, by stating that the a degree in computers or any electronic or electrical-related field is a sufficient qualification for the proffered position, the petitioner's CEO conceded that it does not require a minimum of a bachelor's degree or the equivalent in a specific specialty.

The vacancy announcements provided are the only evidence in the record about the petitioner's previous history of recruiting and hiring, and they uniformly fail to demonstrate that the petitioner normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty for its

² The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. Citizenship and Immigration Services (CIS) 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, 388. 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 interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

programmer analyst positions. The CEO's statement pertains to the petitioner's current practice pertinent to the proffered position, and affirmatively states that a degree in any of a wide array of cases is a sufficient qualification for the proffered position. The petitioner has not demonstrated that it normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty for the proffered position and has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that the nature of the specific duties of the proffered position is so specialized and complex that knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Again, as was noted above, the duties of the proffered position as described by the petitioner's CEO are generic duties of a programmer analyst position. The record contains no indication that those duties are in any way more specialized or complex than the duties of other programmer analyst positions, which, as was also noted above, do not categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty.

The petitioner has not demonstrated that 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. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has not demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to any of the alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The visa petition will be denied on this additional basis.

Also, beyond the decision of the director, the petitioner has not demonstrated that the LCA provided corresponds to the locations where the beneficiary would actually work.

The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part, that in determining whether to approve a Form I-129 visa petition ". . . [USCIS] determines whether the petition is supported by an LCA which corresponds with the petition" In order for an H-1B petition to be approvable, the location shown on the supporting LCA must correspond to the locations where the beneficiary would work, as location determines the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay.

The LCA submitted to support the instant visa petition indicates that the beneficiary would work in Golden Valley, Minnesota, as does the visa petition itself. The petitioner's address is, in fact, in Golden Valley, Minnesota. The record, however, contains a copy of the beneficiary's employment contract, signed by both the beneficiary and the petitioner's director. That contract states:

You will be required to work on a project, at Goden Valley office of [the petitioner]. And sometimes you need to travel to one of the client's place whenever is required, since the clients of [the petitioner] are located through out the US, the travel expenses will be paid by [the petitioner] upon submission of all such receipts.

[Errors in the original]

Subsequently, the same contract states:

You are responsible for all costs associated with transportation to and from work locations to which [the petitioner] assigns you. You will also be responsible for costs associated with lodging.

Although the beneficiary's employment contract contradicts itself pertinent to who will pay the beneficiary's travel expenses when she travels to remote client sites, it makes clear that the beneficiary is expected to work at remote client sites. As the petitioner has not demonstrated that the beneficiary would work exclusively, or even principally, at the petitioner's office in Golden Valley, it has not demonstrated that the LCA submitted corresponds with the visa petition and may be used to support it. The visa petition will be denied for this additional reason.

An additional issue is whether the petitioner has satisfied the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B) to provide an itinerary as initial evidence submitted with the visa petition if the beneficiary would work at more than one location. The itinerary must identify each location where the beneficiary would work and the services the beneficiary would perform there.

In the instant case, the evidence suggests that the beneficiary would not work solely at the petitioner's Golden Valley location. However, the itinerary provided states that she would. That itinerary has not been shown to satisfy the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B). The visa petition will be denied for this additional reason.

The petitioner's failure to provide an itinerary raises another issue, however, in addition to failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B).

Rather than merely denying the visa petition because of the petitioner's failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B) the service center requested, in the May 30, 2008 request for evidence, that the petitioner submit "a complete itinerary of services or engagements that specifies the dates of each service or engagement, [and] the names and addresses of the establishment, venues, or locations where the services will be performed" The petitioner did not comply with that request. That requested evidence was relevant to the material issues of whether the beneficiary would work in a specialty occupation and whether the petitioner would be the beneficiary's actual employer, among other issues.

Even if the petitioner were not compelled by 8 C.F.R. § 214.2(h)(2)(i)(B) to provide an itinerary as part of the initial evidence in this matter, the regulations provide the director with broad

discretionary authority to request evidence in support of a petition. Specifically, pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.”

Moreover, in addition to 8 C.F.R. § 214.2(h)(9)(i), the regulation at 8 C.F.R. § 103.2(b)(8) provides the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue a request for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any request for evidence that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

The AAO finds that, in the context of the record of proceeding as it existed at the time the request for evidence was issued, the request for itinerary evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it addressed was evidence relevant to material issues in this case.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition must be denied for this additional reason.

The final issue pertains to another type of evidence the service center requested on May 30, 2008. The RFE issued on that date requested:

If any of [the petitioner’s] previously approved nonimmigrant beneficiaries have resigned, been dismissed, or failed to join the [petitioner], provide a letter that specifically requests withdrawal for each of those beneficiaries’ petitions.

The RFE requested that all of the evidence in response be provided at one time, rather than in installments. The RFE emphasized this requirement by stating, “Pursuant to 8 C.F.R. § 103.2(b)(11) failure to submit ALL evidence requested at one time may result in the denial of your application.”

In the material submitted in response to the RFE, the petitioner’s director stated, “The letter of request for withdrawal of the petitions for those who are no longer working for or failed to join is sent in a separate mail.”

Those letters were requested for use in the adjudication of the instant petition and were to be provided with the other evidence sent in response to the RFE but were not. They are not in the record and are not readily available to the AAO. The regulation at 8 C.F.R. § 103.2(b)(11) states, in pertinent part, “All requested materials must be submitted together at one time, along with the original USCIS [RFE].”

The requested letters of withdrawal bear upon whether the petitioner has been observing the terms and conditions of its employees’ H-1B status. That is relevant, in turn, to whether the petitioner would observe the terms and conditions of the instant beneficiary’s H-1B status, in the event that the visa petition were approved. Because the petitioner failed to submit the requested letters of withdrawal with the response to the RFE in accordance with the requirements of 8 C.F.R. § 103.2(b)(11), that evidence is considered not to have been submitted in this case. The visa petition will also be denied, pursuant to 8 C.F.R. § 103.2(b)(14), for failure to submit the letters of withdrawal as requested.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.