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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

D2

[REDACTED]

DATE: **OCT 07 2011** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:
[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 \$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

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 a comprehensive ocular medical practice that seeks to employ the beneficiary as an ophthalmic associate. 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 beneficiary was not qualified to perform the services of a specialty occupation.

On appeal, counsel for the petitioner contends that the director's findings with regard to the beneficiary's qualifications were based on an erroneous conclusion that the beneficiary would be employed as an optometrist. Counsel asserts that, as indicated on the Form I-129 petition, the actual position offered to the beneficiary was that of an ophthalmic associate, a position that did not require a license as stated by the director. Counsel submits a brief in support of these contentions.

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 counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (I) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required degree, the petitioner must show that the beneficiary possesses both (1) experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As a preliminary matter, the AAO notes that the nature and duties of the proffered position are disputed in this matter. While the petitioner indicates that the position offered to the beneficiary is that of an ophthalmic associate, the director found that, based on the description of duties provided by both the petitioner and counsel, the position is actually akin to that of an optometrist. Prior to addressing the issue of the beneficiary's qualifications, the AAO will first review the record to determine the proper classification of the proffered position and whether it qualifies as 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 [(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 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 and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard,

USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such 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 a March 23, 2009 letter, the petitioner explained that its business was founded in 2000 and that it provided complete ocular care to the Northern Nevada area. It further claimed to employ a team of nine professionals and to have revenues in excess of \$1 million. Regarding the beneficiary, the petitioner stated that she would be employed as an ophthalmic associate under the supervision of Dr. [REDACTED] and would examine patients at the petitioner's main office. The petitioner further claimed that the position of ophthalmic associate did not require licensure under Nevada state law.

Regarding her duties, the petitioner claimed that she would perform the following tasks:

[O]btaining patient histories and identifying chief complaints, determination of refractive states and best-corrected visual acuities, fit and dispense spectacles, determine contact lens prescription, fit, and educate contact lens insertion and removal, measure intraocular pressures, conduct fundamental ocular neurologic screenings, measure corneal curvature, perform retinal photography including the use of telemedicine image transfer devices, propose and present to Dr. [REDACTED] management and treatment options, schedule and educate patients on surgical procedures, assist Dr. [REDACTED] in the operating room and beyond; thereby, helping patients throughout their pre-op, intra-op, and post-operative periods.

The petitioner further claimed that the beneficiary possessed a Doctor of Optometry degree from Centro Escolar University in the Philippines, and submitted an academic evaluation by the Trustforte Corporation equating the degree to a U.S. Doctor of Optometry degree.

In a July 13, 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. Additionally, the petitioner requested evidence pertaining to the beneficiary's qualifications.

The petitioner, through counsel, addressed the director's queries in a response dated August 19, 2009. Counsel reiterated the duties of the beneficiary, indicating that some of her required activities included the following:

Meeting with patients, identifying patient complaints, determine refractive states, measure intraocular pressures, conduct fundamental ocular neurologic screenings, measure corneal curvature, perform retinol photography, and assist Dr. [REDACTED] in the operating room.

Counsel stated that the petitioner required the beneficiary, as an ophthalmic associate, to possess a Doctor of Optometry degree (OD) for entry into the proffered position. Counsel further explained the difference between a licensed optometrist and an unlicensed optometrist, which he claimed was also known as an ophthalmic associate. Specifically, counsel claimed that an individual who passes the National Board Examination and complies with any other state-specific requirements "is considered licensed to **independently** practice optometry." (Emphasis is original). Likewise, an individual who does not take or pass the National Board Examination and otherwise fulfill all state requirements cannot independently practice optometry, but is nevertheless equally trained to perform the same duties as a licensed optometrist. Counsel continued by stating that the activities to be performed by the beneficiary are activities performed by either a licensed or unlicensed optometrist, and that such activities are highly skilled and require significant post-baccalaureate training in optometry. Counsel concluded by claiming that an individual who performs these duties is required to have substantial knowledge of ocular systems.

Moreover, counsel clarified that the petitioner seeks to hire the beneficiary under the position title of ophthalmic associate and not optometrist because that the State of Nevada renders it unlawful for an ophthalmologist, such as the petitioner, to employ a licensed optometrist. Counsel concluded by stating as follows:

The job duties of an Ophthalmic Associate are identical to a licensed Optometrist except an Ophthalmic Associate is not permitted to write prescriptions for spectacles or contact lenses. An Ophthalmic Associate will examine a patient's eyes to diagnose vision problems, such as nearsightedness and farsightedness, and she will test patients' depth and color perceptions, as well [as] a patient's ability to focus and coordinate their eyes. Ophthalmic Associates, such as [the beneficiary] will also test for glaucoma and other eye diseases as well [as] to diagnose conditions caused by diabetes and high blood pressure and refer those patients to the appropriate medical practitioner.

On September 18, 2009, the director denied the petition, determining that the petitioner had failed to establish that the beneficiary was qualified to perform the duties of a specialty occupation.

Specifically, the director noted that the beneficiary's failure to possess the appropriate licensure rendered her unqualified to perform the duties of the proffered position as described.

On appeal, counsel repeats the contentions set forth in response to the RFE, and claims that, since the beneficiary will not be employed as a licensed optometrist, the requirement for licensure is not applicable in this matter.

Upon review, the AAO concurs with the director's findings. The petitioner claims that the title of the proffered position is ophthalmic associate, but simultaneously claims that the duties to be performed by the beneficiary are those of a trained, albeit unlicensed, optometrist. As discussed previously, USCIS does not simply rely on a position's title when determining the nature of the proffered position. 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 regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the 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 has stated that the proffered position is that of an ophthalmic associate. 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 medical assistant, which includes that occupation of ophthalmic assistants. In relevant part, the *Handbook* states:

Ophthalmic medical assistants, optometric assistants, and podiatric medical assistants are examples of specialized assistants who have additional duties. Ophthalmic medical assistants help ophthalmologists provide eye care. They conduct diagnostic tests, measure and record vision, and test eye muscle function. They apply eye dressings and also show patients how to insert, remove, and care for contact lenses. Under the direction of the physician, ophthalmic medical assistants may administer eye medications. They also maintain optical and surgical instruments and may assist the ophthalmologist in surgery. Optometric assistants also help provide eye care, working with optometrists. They provide chair-side assistance, instruct patients about contact lens use and care, conduct preliminary tests on patients, and otherwise provide assistance while working directly with an optometrist. Podiatric medical assistants make castings of feet, expose and develop x rays, and assist podiatrists in surgery.

See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2010-11 Edition, "Medical Assistants," <<http://www.bls.gov/oco/ocos164.htm>> (last accessed September 21, 2011).

While the above discussion includes general tasks reflected in the petitioner's description of the duties of the proffered position, the nature and responsibilities of the proffered position as initially described by the petitioner and again by counsel in response to the RFE extend far beyond the basic tasks described above. Moreover, since counsel for the petitioner admits that the beneficiary will actually be performing the duties of an optometrist, the AAO finds that the *Handbook's* section pertaining to optometrists presents a more accurate depiction of the duties of the proffered position in this matter.¹

Regarding optometrists, the *Handbook* states:

Optometrists, also known as *doctors of optometry*, or *ODs*, are the main providers of vision care. They examine people's eyes to diagnose vision problems, such as nearsightedness and farsightedness, and they test patients' depth and color perception and ability to focus and coordinate the eyes. Optometrists may prescribe eyeglasses or contact lenses, or they may provide other treatments, such as vision therapy or low-vision rehabilitation.

Optometrists also test for glaucoma and other eye diseases and diagnose conditions caused by systemic diseases such as diabetes and high blood pressure, referring patients to other health practitioners as needed. They prescribe medication to treat vision problems or eye diseases, and some provide preoperative and postoperative care to cataract patients, as well as to patients who have had corrective laser surgery. Like other physicians, optometrists encourage preventative measures by promoting nutrition and hygiene education to their patients to minimize the risk of eye disease.

Although most work in a general practice as a primary care optometrist, some optometrists prefer to specialize in a particular field, such as contact lenses, geriatrics, pediatrics, or vision therapy. As a result, an increasing number of optometrists are forming group practices in which each group member specializes in a specific area

¹ It is noted that, even if the proffered position were established as being that of an ophthalmic associate as claimed by the petitioner and counsel, a review of the *Handbook's* section pertaining to the training and qualifications for this occupational category does not indicate that such a position qualifies as a specialty occupation. Specifically, the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation. *See id.* As such, even if counsel prevailed on the argument that the proffered position was in fact an ophthalmic associate and not an optometrist, absent additional evidence that the position qualified as a specialty occupation under one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

while still remaining a full scope practitioner. For example, an expert in low-vision rehabilitation may help legally blind patients by custom fitting them with a magnifying device that will enable them to read. Some may specialize in occupational vision, developing ways to protect workers' eyes from on-the-job strain or injury. Others may focus on sports vision, head trauma, or ocular disease and special testing. A few optometrists teach optometry, perform research, or consult.

Most optometrists are private practitioners who also handle the business aspects of running an office, such as developing a patient base, hiring employees, keeping paper and electronic records, and ordering equipment and supplies. Optometrists who operate franchise optical stores also may have some of these duties.

Optometrists should not be confused with ophthalmologists or dispensing opticians. *Ophthalmologists* are physicians who perform eye surgery, as well as diagnose and treat eye diseases and injuries. Like optometrists, they also examine eyes and prescribe eyeglasses and contact lenses. *Dispensing opticians* fit and adjust eyeglasses and, in some States, may fit contact lenses according to prescriptions written by ophthalmologists or optometrists. (See the sections on physicians and surgeons; and opticians, dispensing, elsewhere in the *Handbook*.)

See *Handbook*, <<http://www.bls.gov/oco/ocos073.htm>> (last accessed September 21, 2011).

The proffered position, as described by counsel, is virtually identical to the *Handbook's* discussion of the occupational category of optometrist. Therefore, the AAO concurs with the director's finding that, despite the use of the title of ophthalmic associate, the correct classification of the proffered position is as an optometrist, which is considered a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A).

According to the *Handbook*, the requirements to perform the duties of an optometrist are as follows:

The Doctor of Optometry degree requires the completion of a 4-year program at an accredited school of optometry, preceded by at least 3 years of preoptometric study at an accredited college or university. **All States require optometrists to be licensed.**

Education and training. Optometrists need a Doctor of Optometry degree, which requires the completion of a 4-year program at an accredited school of optometry. In 2009, there were 19 colleges of optometry in the U.S. and 1 in Puerto Rico that offered programs accredited by the Accreditation Council on Optometric Education of the American Optometric Association. Requirements for admission to optometry schools include college courses in English, mathematics, physics, chemistry, and biology. Because a strong background in science is important, many applicants to optometry school major in a science, such as biology or chemistry, as undergraduates. Other applicants major in another subject and take many science courses offering laboratory experience.

* * *

Licensure. All States and the District of Columbia require that optometrists be licensed. Applicants for a license must have a Doctor of Optometry degree from an accredited optometry school and must pass both a written National Board examination and a National, regional, or State clinical examination. The written and clinical examinations of the National Board of Examiners in Optometry usually are taken during the student's academic career. Many States also require applicants to pass an examination on relevant State laws. Licenses must be renewed every 1 to 3 years and, in all States, continuing education credits are needed for renewal.

See *Handbook*, <<http://www.bls.gov/oco/ocos073.htm>> (last accessed September 21, 2011).

Based on the *Handbook*, a person performing the duties of an optometrist must possess a state license in addition to passing the National Board examination.

Since the petitioner claims that the beneficiary would be rendering her services in Nevada, a review of the applicable statutes and regulations for Nevada is warranted. Section 636.145 of the Nevada Revised Statutes provides:

Unlawful practice of optometry. No person shall engage in the practice of optometry in this State unless:

1. The person has obtained a license pursuant to the provisions of this chapter; and
2. Except for the year in which such license was issued, the person holds a current renewal card for the license.

In addition to requiring optometrists to hold a license, the State of Nevada also restricts persons from performing the duties of an optometrist without such a license. Therefore, counsel's contention that the beneficiary will be performing the duties of an "unlicensed" optometrist is fundamentally flawed, since the beneficiary is statutorily prohibited from performing such duties without a license.

Moreover, section 636.220 of the Nevada Annotated Code provides:

Employment of unlicensed persons for certain services. (NRS 636.125, 636.300)

A licensee shall not employ, either directly or indirectly, an unlicensed person to perform any services for which an optometrist's license is required by law.

Based on this section, counsel's claim that the petitioner will employ the beneficiary as an unlicensed optometrist under the title of ophthalmic associate is likewise prohibited by Nevada statute.

Upon review of the record of proceeding, it is evident that to perform the services of an optometrist, a state license is required in addition to the passing of the National Board examination. In this

matter, counsel for the petitioner attempts to avoid the licensure requirement by titling the position as an ophthalmic associate, a non-specialty occupation that does not require any specialized training. However, as the record clearly indicates by both the description of duties of the position and counsel's own contentions, the beneficiary will indeed be performing the services of an optometrist for the petitioner. Absent evidence that the beneficiary possesses the appropriate licensure, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. For this reason, the director's decision will not be disturbed.

Beyond the decision of the director, the petitioner failed to establish filing eligibility at the time the Form I-129 was received by USCIS.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1), which states in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the DOL when submitting the Form I-129.

In the instant case, the petitioner filed a certified LCA with the petition for the position of ophthalmic associate. However, as discussed above, it has been determined that the beneficiary would not be employed in the position of ophthalmic associate, which is akin to that of a medical assistant, but rather as an "unlicensed" optometrist. Therefore, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA in the occupational specialty and thus failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). For this additional reason, the petition may not be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's

enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.