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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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U.S. Citizenship  
and Immigration  
Services



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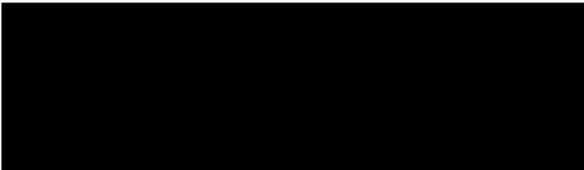
Date: JUN 18 2012 Office: CALIFORNIA SERVICE CENTER



IN RE: 

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 of the California Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner claims to be an online exporter and distributor of vitamin and health products with two employees. It seeks to employ the beneficiary as an international business analyst 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 proffered position was not a specialty occupation. On appeal, counsel for the petitioner contends that the director's findings were erroneous, and submits a brief and additional evidence in support of this contention.

The issue before the AAO on appeal 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 employment 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means 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 (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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the petitioner’s response to the director’s RFE; (4) the director’s decision denying the petition; and (5) the petitioner’s Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

In this matter, the petitioner seeks the beneficiary's services as an international business analyst. The petitioner's letter of support dated September 24, 2009 indicates the proffered position would require the beneficiary to perform the following duties and responsibilities:

Her duties and responsibilities will include reviewing, analyzing and suggesting improvements in the development of the company's organizational structure. She will analyze and propose ways to improve trade efficiency, develop the expert market in Asia and profits relating to international trade relating to our products.

She will develop projects that require analysis to collect, review, and analyze information relating to our online website and international trade, particularly with Asia. She will review assignments or contracts and analyze relevant data, which may include annual revenues, employment, or expenditures, while observing operations of the company. The international business analyst then develops solutions to the problem. In the course of preparing their recommendations, they take into account the nature of the organization, the relationship it has with others in the international trade industry, and its internal organization and culture.

Once they have decided on a course of action, the business analyst will report their findings and recommendations to management to implement the solutions. She will explain the analyze[d] data that was gathered and develop and explain the solutions at hand.

The support letter does not set forth the petitioner's minimum requirements for the proffered position, but states that the beneficiary has a bachelor of science degree from Fairleigh Dickinson University in New Jersey in management and hospitality, as well as valuable experience with international markets. The petitioner further claims that the beneficiary has the type of background necessary to enhance the development of the company. The petitioner submitted copies of the beneficiary's bachelor of science degree and transcripts from Fairleigh Dickinson University as evidence of her qualifications.

The submitted Labor Condition Application (LCA) was certified for an "International Business Analyst" to work full-time at the petitioner's business in Anaheim, California at an annual salary of \$43,326.00, and the position was classified on the LCA and on the Form I-129 as a management analyst, SOC/O\*Net Code 31-1111.00.

On January 12, 2010, the director requested, *inter alia*, additional information from the petitioner to establish that the proffered position is a specialty occupation. Specifically, the director requested a more detailed description of the proffered position as well as information pertaining to the petitioner's business.

In a response dated February 9, 2010, counsel addressed the director's requests and submitted the petitioner's tax returns, wage reports, floor plan, photos of the business, lease agreement and business license. However, counsel did not submit a more detailed description of the job duties for

the proffered position as the director requested, but merely reiterated the duties described by the petitioner with the initial filing. Regarding the question of whether the proffered position is a specialty occupation, counsel stated that the *Occupational Outlook Handbook (Handbook)* issued by the U.S. Department of Labor (DOL) indicates that a college degree is normally required for a position as an international business analyst. Counsel further claimed that the *Handbook* indicates that many such positions require a master's degree.

The director denied the petitioner, finding that the proffered position was not a specialty occupation. Specifically, the director found that the petitioner failed to demonstrate that its business could utilize the beneficiary in the capacity as a management analyst exclusively in the analysis of the petitioner's structure, efficiency, or profitability for the requested three-year validity period.

On appeal, counsel contends that the proffered position qualifies as an H-1B specialty occupation, contending that due to the nature of the work involved, a baccalaureate degree or its equivalent is needed. Counsel further stated that the beneficiary has such minimum requirements based on her bachelor's degree in management and hospitality. Counsel also contends that the director's conclusion that the petitioning entity does not appear to be of a size and scope for which it would be necessary to hire a management analyst constitutes gross error, and concludes by asserting that the director's decision is contrary to the great weight of the evidence.

In determining whether the petitioner has established that the proffered position is a specialty occupation, USCIS must also determine in part whether a bona fide offer of employment in the proffered position is real and existing at the time of filing. See 8 C.F.R. § 103.2(b)(1). In other words, while the proffered position must qualify as a specialty occupation, the claimed specialty occupation employment to be performed by the beneficiary must also be principally based on a reasonable and credible offer of employment that is actually for the proffered position as described. In the instant case, the director determined that the record contained insufficient evidence to establish that a credible offer of employment existed at the time the instant petition was filed. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Therefore, the AAO will first consider the bona fides of the job offer.

In the instant matter, the petitioner claims that it is an online exporter and distributor of vitamin and health products with two employees. The petitioner's tax return for 2008 in the record shows that the petitioner is structured as a limited liability company (LLC) with two LLC members (each of them owns a 50% ownership interest). The tax return shows that the petitioner did not pay any salaries and wages in 2008. The petitioner did not submit its tax return for 2009, but the petitioner's Form 941, Employer's Quarterly Federal Tax Return, for 2009 shows that the petitioner paid Kavi Cherngchaosil \$7,500.00 in the first quarter, \$8,375.00 in the second quarter, and \$1,045.48 in the third quarter of 2009. The record also shows that the petitioner paid one of its two LLC members in the last two quarters of 2009. It is not clear whether the petitioner paid these amounts to one of its owners as officer compensation or as salary since the record does not contain the petitioner's tax return for 2009 or the LLC member's Form W-2 or individual tax return. However, the record clearly shows that the petitioner had no paid workers other than the business owner himself at the

time the instant petition was filed on November 20, 2009. Further, the petitioner did not submit its organizational chart showing the proposed position of international business analyst within its organizational hierarchy. Moreover, the lease provided for the petitioner's premises indicates that [REDACTED], one of its owners, is the lessee, not the petitioner. Without evidence that the petitioner has sufficient staff to perform routine operational duties, such as sales, marketing, and general administrative tasks, as well as physical premises out of which this staff can work, the AAO cannot conclude that a bona fide position of international business analyst existed at the time of filing.

While the petitioner attests that it will pay the beneficiary an annual salary of \$43,326.00 on the petition and on the LCA, the petitioner's tax return for the previous year shows that, even when accounting for depreciation, the petitioner still had a negative net income (-\$20,145) even without paying any salaries and wages. It does not appear that the petitioner has a legitimate need for a management analyst, nor does it appear feasible that the petitioner could financially afford the services of a management analyst. The petitioner, therefore, failed to demonstrate that a bona fide offer of employment as a management analyst/international business analyst existed at the time of filing.

Even if the petitioner had established that a bona fide offer of employment existed at the time of filing, the proffered position does not qualify as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). USCIS routinely relies on the *Handbook* when determining if a position qualifies as a specialty occupation. Therefore, the AAO will review the *Handbook* in order to make an independent determination of the proffered position's classification.

The *Handbook* describes the occupation of management analyst as follows:

Management analysts, often called management consultants, propose ways to improve an organization's efficiency. They advise managers on how to make organizations more profitable through reduced costs and increased revenues.

#### Duties

Management analysts typically do the following:

- Gather and organize information about the problem to be solved or the procedure to be improved
- Interview personnel and conduct on-site observations to determine the methods, equipment, and personnel that will be needed
- Analyze financial and other data, including revenue, expenditure, and employment reports, including, sometimes, building and using sophisticated mathematical models
- Develop solutions or alternative practices
- Recommend new systems, procedures, or organizational changes
- Make recommendations to management through presentations or written reports

- Confer with managers to ensure that the changes are working

Although some management analysts work for the organization that they are analyzing, most work as consultants on a contractual basis.

Whether they are self-employed or part of a large consulting company, the work of a management analyst may vary from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the client organization's managers.

Management analysts often specialize in certain areas, such as inventory management or reorganizing corporate structures to eliminate duplicate and nonessential jobs. Some consultants specialize in a specific industry, such as healthcare or telecommunications. In government, management analysts usually specialize by type of agency.

Organizations hire consultants to develop strategies for entering and remaining competitive in the electronic marketplace.

Management analysts who work on contract may write proposals and bid for jobs. Typically, an organization that needs the help of a management analyst solicits proposals from a number of consultants and consulting companies that specialize in the needed work. Those who want the work must then submit a proposal by the deadline that explains how they will do the work, who will do the work, why they are the best consultants to do the work, what the schedule will be, and how much it will cost. The organization that needs the consultants then selects the proposal that best meets its needs and budget.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Management Analysts, <http://www.bls.gov/ooh/Business-and-Financial/Management-analysts.htm#tab-2> (last visited June 5, 2012). The AAO concurs with the petitioner's contention that the proffered position, as described briefly in the record, is akin to that of a management analyst as described in the *Handbook*. For the reasons set forth above, however, the record fails to demonstrate that a bona fide position of management analyst existed at the time of filing based upon review of the petitioner's business operations and organizational structure. That being said, even if the petitioner demonstrated a legitimate need for a management analyst, it cannot be found that this occupation categorically qualifies as a specialty occupation since 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.

With respect to education and training requirements for "Management Analysts", the *Handbook* states as follows:

Most management analysts have at least a bachelor's degree. The Certified Management Consultant (CMC) designation may improve job prospects.

#### Education

A bachelor's degree is the typical entry-level requirement for management analysts. However, some employers prefer to hire candidates who have a master's degree in business administration (MBA). In 2010, 28 percent of management analysts had a master's degree.

Few colleges and universities offer formal programs in management consulting. However, many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business, management, accounting, marketing, economics, statistics, computer and information science, and engineering.

Analysts also routinely attend conferences to stay up to date on current developments in their field.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Management Analysts, <http://www.bls.gov/ooh/Business-and-Financial/Management-analysts.htm#tab-4> (last visited June 5, 2012). In short, the descriptions provided in the *Handbook* do not clearly show that Management Analysts are positions for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum entry requirement. While the *Handbook* states that most management analysts have a bachelor's degree, it also states that "many fields of study provide a suitable education." The *Handbook*, therefore, does not indicate that a baccalaureate or higher degree in a specific specialty or its equivalent is required for entry into the occupation.

Moreover, as previously noted, the petitioner's support letter dated September 24, 2009 only states that the beneficiary qualifies for the proffered position because she has a bachelor of science degree from Fairleigh Dickinson University in New Jersey in management and hospitality and valuable experience with international markets. The petitioner, however, does not clearly require at least a bachelor's degree in a specific specialty for entry into the occupation.

To prove that a job requires the theoretical and practical application of a body of highly 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 or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. On appeal, counsel asserts that the beneficiary is qualified for the proffered position because she holds a bachelor's degree in management and hospitality. The educational transcripts submitted into the record, however, indicate that the beneficiary's degree is in hotel, restaurant, and tourism management.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, absent evidence to the contrary, a degree in hotel, restaurant, and tourism management cannot be considered to be a close correlation with the duties of a management analyst position for an online exporter and distributor of vitamin and health products, and therefore, a requirement for such a degree will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

The record's descriptions of the proposed duties are limited to generic and generalized functions which are normally performed by management analysts pursuant to descriptions in the *Handbook*, and based on the fact that the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty or its equivalent is a minimum entry requirement for this occupation, it cannot be found that the petitioner has satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty, and the petitioner failed to demonstrate that parallel management analyst positions for organizations that are similar to the petitioner require at least a bachelor's degree in a specific specialty for entry into the occupation. Therefore, the petitioner failed to demonstrate that it meets the requirements of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. Neither the petitioner nor its counsel has provided evidence to distinguish the proffered position as unique from or more complex than management analyst positions, such as those as described in the *Handbook*, that can be performed by persons without a specialty degree or its equivalent.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- the employer normally requires a degree or its equivalent for the position. In response to the RFE, counsel for the petitioner claimed that the proffered position is a new position, and therefore there is no hiring history to examine. Since this is a newly-created position, the petitioner has not established a prior history of hiring only persons with at least a bachelor's degree in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).<sup>1</sup>

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. While the petitioner and its counsel contend that the nature of the proffered position's duties are so specialized and complex that the proffered position must be classified as a specialty occupation, relative complexity is not sufficiently developed by the petitioner and, absent evidence to the contrary, the duties of the proposed position are not so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty.<sup>2</sup> The fact that the petitioner obtained the LCA certification and Level I prevailing wage for management analysts does not demonstrate that the duties of the proffered position are so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent and, in fact, support the opposite conclusion. The AAO, therefore, concludes that the proffered position does not meet the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this additional reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the

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<sup>1</sup> 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 claimed 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 artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

<sup>2</sup> It is further noted that any claims of specialization and complexity are simply not credible given the Level I designation on the supporting LCA. If the proffered position did in fact involve some level of complexity relative to other management analysts, the petitioner would have to have submitted an LCA certified for at least a Level III, and more likely a Level IV, position.

petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit sufficient evidence to establish that the beneficiary's degree is in a specific specialty required by the proffered position even if such a bachelor's degree in a specific specialty were required. Specifically and as alluded to above, it is unclear how a bachelor's degree in hotel, restaurant, and tourism management would qualify the beneficiary to perform the duties of a management analyst for an online exporter and wholesaler of vitamin and health products. As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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