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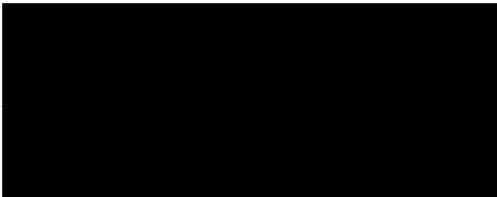


FILE: WAC 03 025 53421 Office: CALIFORNIA SERVICE CENTER Date: JUN 10 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

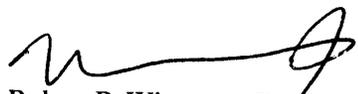
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record the petitioner was established March 5, 1999, and claims to be engaged in the production of film, TV documentaries, publications, and videos. The petitioner claims to be a subsidiary [REDACTED] located in Budapest, Hungary. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and CEO for a period of two years. The beneficiary was initially granted a one-year period of stay to open a new office in the United States.

The director determined that the petitioner had failed to establish that: (1) the beneficiary had been or would be employed primarily in a managerial or executive capacity; (2) the petitioning entity has been doing business; and (3) the petitioner has secured sufficient physical premises to house its office.

On appeal, counsel disagrees with the director's decision and asserts that the petitioner has submitted sufficient evidence to demonstrate that the beneficiary has been and will be employed primarily in a managerial or executive capacity; that the organization has been doing business; and that the petitioner has secured sufficient physical premises to house its office.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) of the Act which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H);
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily—

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily—

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the petition, the petitioner described the beneficiary's past duties with the U.S. entity as:

[The beneficiary] generally oversees the business activities of the company with complete discretionary authority overseeing the development and implementation of promotion, marketing, and sales. [The beneficiary] has authority to oversee contract negotiations, determination of price, policymaking, etc. He oversees the administration and fiancé [sic] of the company, and hiring and firing employees.

The petitioner described the beneficiary's proposed duties as:

[The beneficiary] will be functioning as an executive capacity [sic], as President, CEO. [The beneficiary] will direct the management of the organization, establish goals and policies by exercising wide range of latitude in discretionary decision making. He will receive only general supervision of direction from the parent co's [sic] shareholders. Substantially, his duties will be at the executive level. He will plan, organize, direct, and control the organization's major functions.

In a letter of support, dated October 28, 2002, the foreign entity's president and CEO described the beneficiary's present and proposed job duties in part as:

Initially, [the beneficiary] will continue organizing and setting up the corporation. He will hire employees, negotiate contracts, among other work duties. Once the subsidiary is operating regularly as a business, and have [sic] a manager and other employees to perform the every day business duties, [the beneficiary] will continue to function in an executive capacity, as President, C.E.O.

[The beneficiary] will direct the management of the organization, will establish goals and policies of the organization, by exercising wide latitude in discretionary decision making. He will receive only general supervision or direction from shareholders of the Hungarian parent company. Substantially all of his duties will be at the executive level. He will plan, organize, direct and control the organization's major functions by working through other managerial or professional subordinate employees.

The petitioner described the proposed U.S. entity personnel as managing director, production supervisor, publication supervisor, and executive assistant/secretary.

In response to the director's request for additional evidence on this subject, counsel stated that the U.S. entity has not yet hired employees due to the company's financial status. Counsel further stated that until the U.S. entity could begin realizing growth and a profit, it would work with "outsiders as co-producers." Counsel contended the beneficiary would perform in an executive capacity in that he would continue organizing and setting up the organization, negotiate contracts, and direct the management of the organization. Counsel stated the beneficiary's job duties in the United States would involve:

- Meetings including meetings with buyers for market agreements, media sources for selling Hungarian productions in the U.S., and business contacts to establish opportunities for production sites, like private villas, gardens, farms, etc.
- Discussions via telephone and via email to create and maintain business relations in the U.S., Hungary, and other European countries.
- Travels for productions [sic] sites including visiting, choosing, controlling places and spaces for shootings, pre and post-production works.

Counsel further stated that the foreign entity would continue to pay the beneficiary's salary and living expenses.

The director denied the petition, determining that the petitioner had failed to submit sufficient evidence to establish that the beneficiary had been and would be employed by the U.S. entity primarily in a managerial or executive capacity. The director stated that after more than one year the petitioner has failed to hire any other employees besides the beneficiary. The director noted that based upon a review of the evidence, the beneficiary's duties were not at the managerial or executive level, but appeared to consist of the day-to-day duties of a film production business including: sales, purchasing, negotiations, and bookkeeping.

On appeal, counsel disagrees with the director's decision and asserts that as a result of the 9/11 tragedy the beneficiary has spent his time trying to negotiate and close contracts. Counsel further asserts that it had not

been feasible to hire new employees where the U.S. entity was not able to realize a profit. Counsel claims that the beneficiary has not been able to perform all of his managerial or executive duties with "no employees to manage or direct." Counsel concludes by stating that the U.S. entity recently entered into an exclusive distribution agreement and anticipates company growth and profit. On appeal, the petitioner submits a copy of the exclusive distribution agreement, dated March 5, 2003.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In the instant matter, the record shows that the beneficiary was the sole employee of the U.S. entity at the time the petition was filed. Based upon duty descriptions contained in the record, it appears that the beneficiary primarily performs the sales, contract negotiation, marketing, and production functions of the organization. Consequently, there is insufficient evidence to show that the beneficiary has performed or will perform the high level responsibilities as defined, or that he has performed or will primarily perform those duties rather than spending the majority of his time performing day-to-day functions of the organization.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include establishing goals and policies, organizing and setting up the corporation, overseeing business activities, and directing the management of the organization. The petitioner did not, however, define the beneficiary's goals and policies or clarify how he will oversee business activities and manage the organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision making. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, supra*; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner describes the beneficiary as being involved in the finance, sales and contract negotiating process, and marketing the petitioner's product. Since the beneficiary actually performs administrative work, markets the petitioner's product, negotiates contracts, and sells the company product, he is performing a task necessary to provide a service or product and this duty will not be considered managerial or executive in nature. An employee who primarily performs the tasks necessary to produce a product or to

provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Even though the petitioner claims that the beneficiary directs and manages the petitioner's sales, marketing, and accounting activities, it does not claim to have anyone on its staff to actually perform those functions. Thus, either the beneficiary himself is performing the sales, marketing, or accounting functions or he does not actually manage the functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has failed to submit sufficient evidence to establish that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Furthermore, the record demonstrates that the U.S. entity has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, this petition may not be approved.

The second issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the U.S. entity has been doing business.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner claims that the U.S. entity is a subsidiary of [REDACTED], located in Hungary. The petitioner also claims that the U.S. entity was incorporated in 1999 and engages in film production, production of TV documentaries, cultural publications, and video production. In a letter of support, dated October 28, 2002, the petitioner stated, "the US subsidiary has not been producing profit yet." The petitioner submitted a business plan covering the years 2002 through 2003 for the foreign entity, which encompassed plans for the U.S. entity. The plan included: the production and publication of scientific and documentary films in the United States; the preparation of broadcasting programs and documentaries in the United States; providing camera rental, video production, and other miscellaneous services to U.S. customers; engaging in book publication in the United States, including films, documentaries, and videos; and engaging in on-demand film and video brokering between the United States film and video producers. The petitioner submitted copies of the U.S. entity's IRS Form 1120, U.S. Corporation Income Tax Return for the year 2001; California State Form 100, California Corporation Income Tax Return for the year 2001; a photograph of a Bank of America bank card; a business proposal, dated May 29, 2002, from [REDACTED] to the U.S. entity concerning "World of Prisons" series; a translated written offer to the U.S. entity from Digitpost Ltd., located in Hungary; a translated written notice of assignment from [REDACTED] in Hungary; and a letter of interest from [REDACTED]

In response to the director's request for additional evidence on the subject, the petitioner stated that the U.S. entity did not have a business bank account or commercial insurance. The petitioner submitted as evidence copies of the U.S. entity's Articles of Incorporation, Statement by Domestic Stock Corporation, and Federal Employer ID number Application. The petitioner also submitted copies of translated offers to purchase documentaries from the U.S. entity, and authorizations to market Hungarian films and documentaries in the United States.

The director denied the petition after determining that the petitioner had failed to submit sufficient evidence to show that the U.S. entity has been doing business. The director stated that it appeared from the record that the U.S. entity was merely maintaining a representative office for the foreign entity and that the beneficiary was merely performing as a sales or purchasing agent in the United States. The director noted that the U.S. entity's address was that of its legal representative thus proving that it had not acquired sufficient physical premises to conduct business. The director concluded by noting that the petitioner had failed to submit sufficient evidence to show that the U.S. entity is providing a regular, systematic, and continuous provision of goods and/or services as a qualifying organization.

On appeal, counsel disagrees with the director's decision and asserts that the foreign entity will continue to finance the U.S. entity. Counsel also asserts that the U.S. entity recently entered into an exclusive distribution agreement with [REDACTED]. On appeal, the petitioner submits a copy of an exclusive distribution agreement entered into by the U.S. entity, [REDACTED] and [REDACTED] and dated March 5, 2003.

The regulation at 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(1)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the

regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). Counsel and the petitioner contend that the U.S. entity has been in operation for only one year since the beneficiary was initially granted L-1A intracompany transferee status. They further contend that a film and video production business needs more than one year to develop into a viable entity. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

The evidence initially submitted by the petitioner demonstrated that the U.S. entity had received offers and authorizations to sell video productions and documentaries. However, there was nothing contained in the record to demonstrate that the organization actually conducted business in the year preceding the filing of this petition. When asked by the director to submit evidence of a business bank account, business insurance policy, list of employees, list of business property, business licenses, and quarterly wage reports, the petitioner responded by asserting that the U.S. entity either did not have or had not yet obtained such items. Furthermore, the U.S. entity's IRS Form 1120, U.S. Corporate Tax Return for 2001 and Form 100, California Corporate Tax Return for 2001 show no income from sales for that year.

On appeal, counsel relies on evidence that was produced only after the decision to deny the petition was made. The petitioner submitted a copy of an exclusive distribution agreement, dated March 5, 2003. It is noted for the record that the petition in the instant matter was filed November 1, 2002. This document was not in existence at the time the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp., supra*. CIS cannot consider facts that come into being only subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). Based upon a review of the record, there has been insufficient evidence submitted to establish that the U.S. entity has been doing business as defined by the regulations. For this additional reason, this petition may not be approved.

The third issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the U.S. entity has secured sufficient physical premises to house its business as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner initially indicated that the U.S. entity's business address was [REDACTED], in Los Angeles, California.

The director stated that the address provided was the petitioner's attorney's address, and subsequently requested the petitioner submit a signed and dated lease agreement. The director also requested the petitioner to submit a copy of its business insurance policy.

In response to the director's request for additional evidence, the petitioner submitted a copy of a lease agreement and black and white photographs of the business premises. The petitioner stated that the U.S. entity had not yet acquired a business insurance policy.

The director denied the petition after determining that the petitioner had failed to submit sufficient evidence to demonstrate that the U.S. entity had acquired sufficient physical premises to house its business. The director noted that it appeared from the record that the U.S. entity was merely maintaining a representative office for the foreign entity.

On appeal, counsel disagrees with the director's decision and asserts that the U.S. entity has leased its own office space within the same two-story building which houses the attorney's office. Counsel asserts that although the address to both offices may be the same, there is a difference in suite numbers. Counsel further asserts that the building in question occupies thirteen tenants, and is equipped with a large reception area, conference room, two kitchens, and a private parking lot.

On reviewing the petition and the evidence, the petitioner has not established that the U.S. entity has acquired sufficient physical premises to house its business office. In this matter, the lease agreement is signed and dated February 15, 1999. The agreement states in part:

1. TERM: The terms shall be for a period of 10 month(s), commencing on the 15th day of, February 1999 and continuing through December 15, 1999 at a total rent of \$2,500.00
 . . .
5. OPTION: Lessee has the right to exercise an option for an additional rental lease at the rental rate to be determined upon renewal of lease giving written notice to lessor no later than 60 days prior to the expiration of the initial lease term.
 . . .
16. INSURANCE: Lessee shall maintain a policy of general liability for the premises, naming Lessor as an additional insured. Further, Lessee shall maintain a policy of insurance for the personal property owned by the Lessee, and lessor shall not be responsible for the damage, removal or destruction of lessee.

Based upon a review of the lease agreement submitted by the petitioner, the U.S. entity's right to occupy space [REDACTED] December 15, 1999. There is no evidence in the record to show that the lease agreement has been renewed, via a written agreement to renew. Furthermore, counsel and the petitioner admit that the U.S. entity has not conducted business, and does not possess a business insurance policy for liability or damage to personal property as required by the lease agreement. Therefore, the petitioner has not shown that sufficient physical premises have been secured to house the business office. For this additional reason, this petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not satisfied all of the enumerated evidentiary requirements. The petitioner has not submitted evidence to demonstrate that the United States and foreign entities are still qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G), in that the foreign entity has continued doing business in the absence of the beneficiary. Although the petitioner stated that the foreign entity has been engaged in cultural service activities, production and publication of films, etc., there is not sufficient evidence of this claim in the record. Furthermore, although the petitioner claims that the foreign entity will continue to financially support the U.S. entity, and pay the beneficiary's salary and living expenses, there is nothing in the record to substantiate that claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of*

California, 14 I&N Dec. 190 (Reg. Comm. 1972). For these additional reasons, the petition may not be approved.

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.2nd 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.