

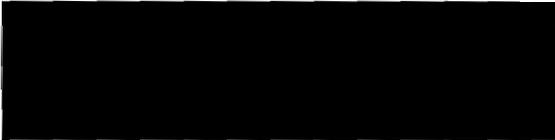


U.S. Citizenship  
and Immigration  
Services

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File: WAC 04 144 51030 Office: CALIFORNIA SERVICE CENTER Date: JUL 06 2006

IN RE: Petitioner:  
Beneficiary:



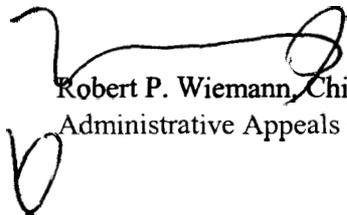
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its CEO/manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a California corporation that claims to export granite, stone, marble and slate products. It states that it is a subsidiary of [REDACTED] located in Agra, India. The beneficiary was initially granted a one-year period in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred in determining that the provided job description for the beneficiary was overly vague. Counsel provides more detailed job descriptions for the beneficiary and his claimed subordinate employees, and asserts that the additional evidence clearly establishes that the beneficiary will perform primarily managerial or executive duties. Counsel asserts that the beneficiary qualifies for the benefit sought as the senior employee within the petitioner's organizational structure, notwithstanding the company's small size. Counsel submits a brief and copies of previously submitted documents in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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) also provides that a visa petition, 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 (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in the present matter is whether the petitioner established that the beneficiary will be employed by the United States entity 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

1. 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.

The nonimmigrant petition was filed on April 23, 2004. The petitioner stated on Form I-129 that it had three employees, and indicated that as the company's CEO/manager, the beneficiary is "fully responsible for the management of the branch company," and responsible for the "overall management of operations of the business." The petitioner did not submit a supporting letter describing the beneficiary's duties or information regarding the company's staffing levels or organizational structure.

The director requested additional evidence on May 20, 2004, in part instructing the petitioner to submit: (1) a more detailed description of the beneficiary's duties in the United States, including the percentage of time he devotes to each of the listed duties; (2) the U.S. company's organizational chart, clearly identifying the beneficiary's position and listing all employees under his supervision by name and job title, and also including a brief description of the job duties, educational level, annual salaries/wages and immigration status of all employees; (3) a list of the U.S. company's employees including names, job titles, beginning and end dates of employment, and wages per week; (4) copies of the company's California Forms DE-6, Quarterly Wage Reports, for the last three quarters; (5) copies of the company's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the last three quarters; and (6) copies of the company's payroll summary, and IRS Forms W-2 and W-3, evidencing wages paid to employees.

The petitioner submitted a response received on August 11, 2004. The petitioner's response included a June 11, 2004 letter in which it noted that the beneficiary was transferred to the United States to serve as CEO/manager of

the company and was subsequently promoted to the position of president. The petitioner provided the following job description:

In the position of President, [the beneficiary] is responsible for determining and formulating policies and business strategies. Specifically, [the beneficiary] is charged with the following duties:

- Planning, directing, and coordinating operational activities at the highest level of management with the help of subordinate managers;
- Providing overall direction of private sector organizations;
- Supervising and controlling the work of other professional and managerial employees;
- Directing over the day-to-day operations of the company; and
- Authority over the firing, hiring and promoting all managerial and professional employees.

[The beneficiary] also serves as the Chief Executive Officer on [the petitioner's] Board of Directors. This is an executive-level position involving responsibility and supervision of several critical functions for [the petitioner] These duties include extensive decision-making authority over policies, activities and monitoring the overall business progress, as well as setting policies for and directing the management of the organization.

The petitioner submitted an organizational chart identifying the beneficiary as president supervising a "sales and secretary" employee, a "warehouse" employee, and an "accounts receivable and payables" employee. Although requested by the director, the petitioner did not provide information regarding the subordinate employees' job duties, educational background, dates of employment or salaries/wages, nor did the petitioner provide the requested breakdown of the percentage of time the beneficiary devotes to his various job duties.

The petitioner submitted its California quarterly wage reports for the first quarter of 2004 and the last quarter of 2003, but did not include the quarterly report for the second quarter of 2004, the quarter in which the petition was filed. The petitioner's records show that the company reported only three employees for the month of March 2004.

The director denied the petition on August 30, 2004, concluding that the petitioner did not establish that the beneficiary will be employed by the United States entity in a managerial or executive capacity. The director observed that the petitioner had failed to provide complete position descriptions for the beneficiary and his subordinates, which are needed to determine who is performing the non-qualifying, operational duties of the business. The director noted that regardless of the degree of authority and discretion the beneficiary may exercise over the business, the petitioner has the burden of showing that the beneficiary's duties are primarily in a managerial or executive capacity. The director found that the submitted job description was too vague to convey an understanding of what the beneficiary does on a daily basis, and further determined that the petitioner had not established that the beneficiary will be primarily supervising a subordinate staff of professional, managerial or supervisory personnel. Finally, the director observed "the fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act."

On appeal, counsel for the petitioner asserts that the beneficiary “is running the whole operation” of the petitioning company as “the leading decision maker,” and objects to the director’s statement that an individual who manages a small business is not necessarily eligible for this visa classification. Counsel provides job descriptions for the beneficiary’s three claimed subordinate employees, and asserts that the director did not previously request information regarding the subordinates’ duties. As counsel’s brief is part of the record, these job descriptions will not be repeated here.

Counsel also provides a more detailed job description for the beneficiary indicating that he performs the following duties: meet prospective buyers to demonstrate the range of products through catalogs and explanation of samples (10%); monitor customer preferences to determine focus of sales efforts (5%); direct and coordinate activities involving sales of manufactured granite and slate products (15%); determine the price of products to be quoted to buyers (5%); review and negotiate on the final contract price in consultation with the Indian parent company (10%); direct, coordinate and review activities in sales and service accounting and record keeping, and in receiving and shipping operations (10%); instruct sales person to fix sales meetings and video presentation (5%); instruct the warehouse employee on dispatch schedules (5%); review budgets and approve budget expenditures (5%); represent company at trade association meetings to promote products (5%); instruct the warehousing staff on arrival and shipping of new material (5%); interact with accounts department to control the receivables/payment schedules and instruct them on the procedures to be followed in preparation of the bills/invoices and remittances for the foreign suppliers (5%); prepare projected weekly/monthly/quarterly revenue flow chart and discuss with accounts staff and parent company; and visit construction sites to attend to customer complaints and interact with architects and construction managers to suggest the suitability of various products (10%).

Counsel asserts that the detailed job descriptions provided for all employees on appeal establish that the beneficiary will be primarily directing the management of the organization, and that his duties are the high-level responsibilities contemplated by the statutory definitions. Counsel emphasizes that the majority of the beneficiary’s time is spent on “directing and coordinating activities involving sales of manufactured granite and slate products.” Counsel contends that Citizenship and Immigration Services must review the complexity of the organizational hierarchy and the beneficiary’s position within it, but notes that “small entities with only several [tiers] of authorities and functions” have been considered by the AAO to be sufficiently complex to support an L-1A manager or executive. Counsel asserts that the petitioner’s current hierarchy “would be sufficient to show that an executive or managerial position exists,” noting that “only the most senior level employees within such small organizations will engage in planning, organizing, directing and controlling an organization’s major functions through other employees.” Counsel concludes that the beneficiary “should be considered as the most senior most employee of the organization to qualify for the position under this rationale.”

Counsel’s assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. 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). The petitioner’s description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Here, the petitioner does not clarify whether the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties

under section 101(a)(44)(B) of the Act, and seems to suggest that he would qualify under either statutory definition. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing that the beneficiary is both an executive and a manager. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

In this case, prior to the director's decision, the petitioner failed to provide a detailed description of the beneficiary's duties as required by the regulations and as requested by the director in his request for evidence. See 8 C.F.R. § 214.2(l)(14)(ii)(C). The petitioner provided no description of the beneficiary's duties with the initial petition filing. Accordingly, the director requested that the petitioner submit a detailed description of the beneficiary's duties and the percentage of time he allocates to each duty. The job description provided in response was brief and vague, and merely paraphrased the statutory definitions of managerial and executive capacity. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). For example, the petitioner stated that the beneficiary would have authority to hire, fire, supervise and control "all managerial and professional employees," exercise extensive "decision making authority," establish company policies, and "direct the management of the organization." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Without a detailed description of the beneficiary's actual duties, the director could not conclude that the beneficiary would be serving in a primarily managerial or executive capacity.

On appeal, counsel provides a more detailed description of the beneficiary's duties and attempts to offer further clarification regarding his duties and the percentage of time he devotes to qualifying managerial functions. However, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO need not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal as it relates to the beneficiary's job duties.

The AAO notes, however, that the new position description offered on appeal does not establish that the beneficiary's duties will be primarily managerial or executive in nature. Counsel asserts that the majority of the beneficiary's time is spent "directing and coordinating" sales activities. However, the petitioner does not employ any workers who are responsible for performing the company's day-to-day sales activities. Although one of the beneficiary's claimed subordinates is designated as a "sales and secretary" employee, the job description provided for this employee does not include any sales tasks, nor do the petitioner's other claimed employees perform duties related to sales or marketing. It is therefore reasonable to assume, and has not been proven otherwise, that the beneficiary is performing all of the petitioner's sales and marketing activities, including all non-qualifying tasks associated with these functions. Such a conclusion is supported by the expanded job description provided on appeal, which indicates that the beneficiary performs a number of non-managerial, non-executive duties related to sales, marketing and post-sales service, including meeting with buyers to demonstrate products, monitoring customer preferences, representing the company at trade association meetings, and visiting customer sites to follow up on past-sales complaints and to assist customers in choosing the appropriate products. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying sales and related operational duties that preclude him from functioning in a primarily managerial or executive role. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel correctly states that the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show 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). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner claimed that the beneficiary will supervise managers and professionals and direct the company "with the help of subordinate managers." There is no evidence that any of the beneficiary's subordinate employees are employed as managers or supervisors. Rather, they perform clerical, secretarial, bookkeeping and routine inventory and warehouse-related duties. Though requested by the director, the petitioner did not provide the level of education required to perform the duties of its secretary, warehouse employee, or accounts payable and receivable employee. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals. The petitioner has not shown that the beneficiary's subordinates are employed in supervisory, professional, or managerial positions, as

required by section 101(a)(44)(A)(ii) of the Act. Furthermore, although requested by the director, the petitioner has not submitted documentary evidence to substantiate the employment of the beneficiary's claimed subordinates as of the date the petition was filed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel alternatively suggests that the beneficiary will serve in a managerial capacity based on the fact that the majority of his time is spent "directing and coordinating" the petitioner's sales function. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's **daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii).** In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

As discussed above, although the petitioner states that the beneficiary "directs and coordinates" the petitioner's sales activities, the petitioner has not submitted evidence to establish that the beneficiary primarily manages the petitioner's sales function. Rather, the petitioner's evidence suggests that the beneficiary will be directly responsible for performing all of the company's sales tasks, including all non-qualifying duties associated with this function. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Here, the petitioner has not met this burden.

Finally, the director correctly concluded that the petitioner had not substantiated its claim that the beneficiary would be employed in a primarily executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee.

As the director observed, the petitioner had not presented sufficient evidence that the beneficiary had a subordinate staff sufficient to allow him to primarily focus on the company's broad goals and policies.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

Contrary to counsel's assertions, the fact that the beneficiary is the most senior employee within the petitioner's three- or four-person company and the only employee charged with any managerial duties is not sufficient to establish that he will serve in a primarily managerial or executive capacity for purposes of this visa classification. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Here, the beneficiary has not established that the beneficiary will not be performing primarily non-qualifying duties.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

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.