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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

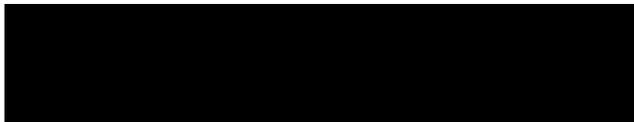
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File: EAC 04 195 53728 Office: VERMONT SERVICE CENTER Date: JUL 05 2007

IN RE: Petitioner:
Beneficiary:



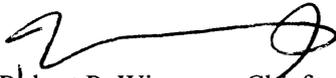
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Vermont 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 employ the beneficiary 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 corporation organized under the laws of the state of New Jersey and is engaged in operating a bakery and selling pastries. The petitioner claims that it is the affiliate of ██████'s Barber Shop, located in Argentina. The petitioner seeks to employ the beneficiary as its executive for marketing and management.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director also noted that the beneficiary had failed to maintain a valid nonimmigrant status and was not eligible for the requested L-1A classification.

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 arguments made by the director in denying the petition are not properly based on the facts presented, the documentary evidence provided by the petitioner, or the requirements of the law. Counsel submits a brief and additional documentary evidence 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 first 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), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

The nonimmigrant petition was filed on June 16, 2004. The petitioner indicated on Form I-129 that the U.S. company has five employees and that the beneficiary, as executive for marketing and management, would be responsible for "marketing to expand business and increase sales." In addition the petitioner submitted the following list of duties, stating that they represent both the beneficiary's current duties with the foreign entity, a barber shop, and his proposed duties with the U.S. petitioner, a retail bakery:

- Meetings with potential clients and neighborhood businesses to inform them of various services or products available (20 hrs/wk);
- Travel time to business relevant workshops and meetings (3 hrs/wk);
- Meetings with consultants, such as lawyers, accountants, etc. (4 hrs./wk);
- Search for other business deals and locations (2 hrs/wk);
- Preparing brochures and other marketing materials (5 hrs/wk);
- Analysis of the competition (2 hrs/wk);
- Preparation of market proposals (1 hrs/wk);
- Creating strategy for constant name recognition within the city (Buenos Aires or Union City) (4 hrs./wk.);
- Gather and analyze customer preferences and buying habits (4 hrs/wk);
- Training of assistant Marketing and management individual (5 hrs/wk);
- Preparing business reports to be reviewed by other shareholders (3 hrs/wk);
- Supervising timely delivery of merchandise or services, negotiate payment terms, and oversee customer satisfaction analysis (2 hrs/wk);

The petitioner submitted an organizational chart which indicates [REDACTED] as president of the company, the beneficiary's proposed role as executive in charge of marketing and management, and [REDACTED] as "training for role as [executive] In charge of Marketing and Management."

On August 19, 2004, the director requested additional evidence, including evidence to establish that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity. Specifically, the director instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's proposed duties indicating how such duties are managerial or executive in nature; (2) complete position descriptions for all employees in the United States including a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis; and (3) additional evidence showing the management and personnel structure of the U.S. entity, including evidence regarding any employees to be supervised by the beneficiary.

In a response dated November 11, 2004, the petitioner submitted a letter from [REDACTED] the manager of the foreign entity, who stated that the beneficiary will supervise two employees in the proposed U.S. position: [REDACTED] manager, and [REDACTED], assistant for marketing. [REDACTED] stated that [REDACTED] currently manages the daily operations of the petitioner and handles the marketing, "but she does not have the necessary experience" that was possessed by her late spouse, who was the former president, or by the beneficiary. [REDACTED] stated that [REDACTED] will assume the role of marketing executive when the beneficiary returns to Argentina.

The petitioner also provided the following description of the beneficiary's proposed duties in the United States:

- Develop and execute strategic marketing plans. Draft and produce high-quality proposals and quals [sic], as well as support overall marketing and business development efforts including web site development and direct mail. (10 hours weekly).
- Utilized various computer programs to organize company structure and goals, such as Microsoft Office programs (Word, Excel, Power Point), Internet and HTML
- Negotiate contracts (when needed)
- Conduct hiring/firing of staff and analyze manager's report on staff (2 hours weekly)
- Analyze and project manpower requirements and present and future business entities (2 hours weekly)
- Locate new businesses for potential acquisition (4 hours weekly)
- Training new Marketing Executive (5 hours weekly)
- Supervise Bakery Manager and new Marketing Executive (5 hours weekly)
- Direct start-up efforts for new business acquisition and opportunities for growth (4 hours weekly)
- Gather and analyze customer base preferences and buying habits in order to maximize profit (2 hours weekly)
- Management of lead lists (1 hour weekly)
- Coordination of promotions and trade shows for bakery and future business acquisitions (2 hours weekly)
- Maintain marketing materials inventory (i.e. brochures, promotional info)(1 hour weekly)
- Develops/Updates in-depth marketing plans, project reports, business forecasts, budgets on Excel spreadsheets (3 hours weekly)
- Directs new and ongoing marketing projects (2 hours weekly)
- Create advertising themes, write copy and prepare layout designs (1 hour weekly)
- Manage accounts receivable for customer database (3 hours weekly)
- Communicate with sister business in Argentina to protect [the foreign organization's] business and keep [the petitioner's] stockholders proper [sic] informed (2 hours weekly)
- Communicate with [the petitioner] about sister business . . . in Argentina when in Argentina directing the [the foreign organization].
- Meeting with neighborhood businesses to improve community standing and cross market (1 hour weekly)
- Meeting with consultants, such as lawyers accountants, etc. (3 hours weekly)
- Analyze the competition (1 hour weekly)
- Create strategy for constant name recognition within the neighborhood (1 hour weekly)
- Prepare business reports and presentations to be viewed by shareholders (3 hours weekly)
- Deal with vendors directly when difficulties arise and negotiate pay terms (2 hours weekly)
- Prepare Business planning reports and financial analysis data (3 hours weekly)
- Travel time for business related matters (3 hours weekly)

The petitioner stated that the petitioner's other employees include the manager (who was previously identified as president), a baker, a baker's assistant who spends most of her time decorating cakes, a cashier/waitress, and a "trainee in marketing/promotion." The petitioner stated that the current marketing trainee would be "re-trained" by the beneficiary to assist him with his duties as executive for marketing. The petitioner provided brief position descriptions for each employee.

On December 6, 2004, the director denied the petition. The director determined that the petitioner had failed to establish that it would employ the beneficiary in a managerial or executive capacity. The director noted the petitioner's claim that the beneficiary would be training two employees to perform marketing duties, but observed that both employees to be trained "seem to have more experience and knowledge" relevant to the job compared to the beneficiary.

On appeal, counsel for the petitioner asserts that the beneficiary meets all of the requirements for an L-1 visa and states that USCIS cannot deny the petition based solely on the small size of the company. Counsel emphasizes that the beneficiary has more than 20 years of executive marketing experience and is being transferred to the United States to assist in training the petitioner's employees in managing and marketing the U.S. business. Counsel notes that the beneficiary's late brother-in-law previously held the proposed position, but unfortunately died unexpectedly in September 2002 and never trained his wife or family in "the executive functions of a corporation." Counsel asserts that the petitioner's current employees, including its new president, have no experience in managing or marketing a business.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed by the petitioner 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(1)(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.*

The petitioner's initial description of the beneficiary's duties indicated that he would spend a substantial proportion of his time performing non-qualifying duties associated with the marketing and promotion of the petitioner's business. For example, the petitioner stated that the beneficiary would spend 20 hours of a 55 hour work week "meeting with potential clients and neighborhood businesses to inform them of various services or products available." The AAO notes that this duty appears to present an unrealistic marketing scheme given the nature of the petitioner's business as a retail bakery and pastry shop. Regardless, the petitioner did not articulate how these duties would fall under the statutory definition of managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act. Several other duties included in the initial job description, including preparing brochures and marketing materials, analysis of the competition, preparation of market proposals, gathering and analyzing customer preferences and buying habits, and "creating strategy for constant name recognition within the city," which collectively account for an additional 16 hours of the beneficiary's time, also represent the beneficiary as personally performing non-qualifying marketing duties. Therefore, the petitioner's initial description of the beneficiary's duties indicated that more than half of his time would be comprised of non-managerial and non-executive duties.

The statute requires that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. *See* sections 101(a)(44)(A) and (B) of the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service or performing other non-managerial tasks, such as marketing tasks, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. The petitioner's description of the beneficiary's duties precludes a finding that he would be employed in a qualifying managerial or executive capacity.

The director nevertheless provided the petitioner an opportunity to clarify the nature of the beneficiary's duties and the petitioner's staffing levels and organizational structure. In response, the petitioner provided a list of 27 duties amounting to a 68-hour work week. While the petitioner initially indicated that the beneficiary would spend 20 hours per week meeting with potential clients, this duty was conspicuously absent from the job description submitted in response to the request for evidence. Further the petitioner added vague managerial duties in an apparent attempt to establish that the beneficiary would be employed in a qualifying capacity. For example, the petitioner stated that the beneficiary will direct "new and ongoing marketing projects," "develop in-depth marketing plans," and "develop and execute strategic marketing plans," and made numerous references to the beneficiary's preparation of business planning reports.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

The AAO further notes that the job descriptions provided for both the beneficiary's foreign position and that provided for the U.S. position are exactly the same. These two businesses, a barber shop and a bakery, in addition to being located in two different countries with different business environments, are quite dissimilar. Thus, for the descriptions to be rote duplications raises doubts regarding their credibility. Further, notwithstanding the considerable length of the job descriptions and the broad range of duties claimed, the foreign entity's brochure identifies the beneficiary as a "stylist," thus raising further questions regarding the accuracy of the purported job duties. The job descriptions provided by the petitioner are required to be detailed and relate specifically to the position which will be occupied such that USCIS can determine that the duties are of a managerial or executive nature, that the description is supported by the record, and such that the position is consistent with other facts asserted in the petition. The actual duties themselves reveal the true nature of the employment. *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). Doubt cast on any aspect of the petitioner's proof may undermine 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).

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. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Based on a review of the totality of the record, the AAO finds that the director reasonably questioned the need to transfer the beneficiary to the United States in a managerial or executive capacity. When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy.

The petitioner has not provided a consistent description of its staffing levels, the number and types of employees to be supervised by the beneficiary, or documentary evidence of the number of employees working for the company at the time the petition was filed. The petitioner initially provided an organizational chart indicating that the beneficiary would supervise the company president, and a marketing trainee, who was identified as [REDACTED]. Additionally, the beneficiary's initial job description did not include any supervisory duties, other than training the "assistant marketing and management individual." In response to the request for evidence, the petitioner stated that the beneficiary would supervise the bakery manager (previously identified as the president), and her subordinates, as well as the marketing trainee. The second organizational chart indicates that [REDACTED] is a baker assistant, and that [REDACTED] is the marketing trainee. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Again, doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Because of these inconsistencies and lack of documentary evidence corroborating the petitioner's claims, the AAO cannot determine the number or types of employees to be supervised by the beneficiary. 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)).

The petitioner operates a retail bakery that is open for business six days per week. It currently claims to employ a president/manager, one baker, a baker assistant who primarily decorates cakes, one cashier/waitress and one marketing assistant. The petitioner has not articulated a reasonable need for a marketing executive in light of the size and nature of the business operated. It would be implausible for a small retail bakery to require more marketing employees than bakers or cashiers. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. See, e.g. *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

As noted above, the director also denied the petition based on the ground that at the time the petition was filed, the beneficiary was not maintaining a valid nonimmigrant status. The record shows that the beneficiary's previously accorded B-1 status expired on July 12, 2003. The beneficiary had timely filed a Form I-539 to request an extension of his B-1 status on June 16, 2003 (EAC 03 193 51676), but it appears that a subsequent request for evidence was returned to USCIS as undeliverable, and the beneficiary's application was never approved. Counsel asserts that the beneficiary was informed by a USCIS representative that his Form I-539 application was misplaced and the beneficiary was not at fault for the lengthy delay in adjudication. Regardless, at the time the instant petition was filed in June 2004, it is likely that any requested extension of the beneficiary's B-1 status would have expired.

However, the director erred by denying the instant petition based solely on the beneficiary's failure to maintain his previous nonimmigrant petition. The regulations require that USCIS make separate determinations with respect to determining eligibility for a requested nonimmigrant visa status, and eligibility for a change of status and extension of stay. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. Therefore, the beneficiary's failure to maintain his B-1 status at the time of filing should have been grounds for denying the requested change and extension of status only, and not the underlying L-1 petition. The director's denial of the petition on this ground will be withdrawn.

Beyond the decision of the director, the AAO finds insufficient evidence to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity. As noted above, the petitioner indicates that the beneficiary was employed by the foreign entity in a role that is identical to the beneficiary's proposed position as an executive for marketing and management for the petitioner. However, the petitioner submitted a brochure for the foreign entity indicating that the beneficiary is in fact a hair stylist at the barber shop owned by the beneficiary and his brother. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19

I&N Dec. at 591. Additionally, although requested by the director, the petitioner was unable to document the employment of the other workers named on the foreign entity's organizational chart. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). A review of the totality of the evidence submitted does not support the petitioner's claim that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The final issue to be discussed is whether the petitioner has established that a qualifying relationship exists between the U.S. company and the overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner's description of the stock distribution of the companies does not meet exactly the definitions constituting a qualifying relationship between the United States and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). Although the petitioner claims an affiliate relationship, the petitioner bases such claim on the foreign entity's alleged 25 percent interest in the petitioner, and the U.S. entity's alleged 30 percent interest in the foreign entity. Based on the petitioner's claims, the two companies do not have the requisite degree of common and ownership and control to be deemed affiliates pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(L), nor is either company a subsidiary of the other pursuant to the definition of subsidiary at 8 C.F.R. § 214.2(l)(1)(ii)(K). Further, the petitioner has offered no documentary evidence to corroborate its claims regarding the ownership and control of either company. 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)). For this additional reason, the petition cannot 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. 2d 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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

ORDER: The appeal is dismissed.