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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
*Office of Administrative Appeals*  
Washington, DC 20529-2090

**U.S. Citizenship  
and Immigration  
Services**

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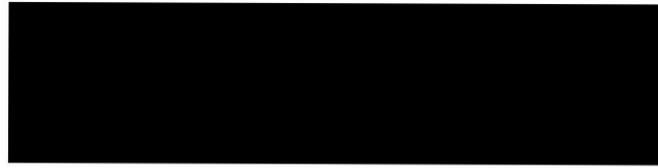
**MAR 20 2009**

IN RE:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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, a New York corporation established in 2007, states that it intends to engage in gemstone trading. The petitioner indicates that it is a subsidiary of [REDACTED], located in Jaipur, India. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a period of one year.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity within one year.

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 petitioner submitted sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of approval of the petition. Counsel asserts that the beneficiary will be directing the purchasing and marketing functions of the organization, as well as supervising a subordinate staff of professionals. Counsel submits a brief 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)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition.

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 petitioner filed the nonimmigrant petition on November 1, 2007. In a letter dated October 17, 2007, the petitioner summarized the beneficiary's proposed duties as follows:

[T]he beneficiary will be performing the duty of Chief Executive Officer of the Petitioner Corporation in the USA and will take full responsibility to manage and operate the day to day activities of the Petitioner in the United States on a daily basis, define goals and develop marketing strategy, hire and supervise market & sales related employee, follow the market trend in the Gemstone and co-ordinate with the Principal in India.

The petitioner indicated that the beneficiary would perform the following duties in an "Executive capacity":

- 1.) Plans, develops and establishes policies and goals of the business organization in accordance with the overall objectives and charter of the company. (15%)
- 2.) The President in conjunction with General Manager would set sales targets, standards in customer service and direct marketing initiative. (10%)
- 3.) Will approve the budget for various activities and supervise their implementation. Will monitor insurance plans, governmental liabilities and taxes and will be the final authority for major financial decisions. (10%)
- 4.) Would actively engage in analyzing the market for core items and identify Priority areas of potential markets in conjunction with General Manager and Sales Staffs. (10%)

- 5.) Represent the organization at major Jewelry Trade Shows in the world. (5%)
- 6.) The President would ensure realization of business of the organization through a well-structured progress review system implemented by the General Manager and would send in report to the principal. (10%)

The petitioner indicated that the beneficiary would perform the following duties in a "Managerial capacity":

- 1.) Plan the general outline of Company's organizational structure. (10%)
- 2.) Orient new employees, review position, responsibilities. Establish work goals and objectives or standards to be achieved. (10%)
- 3.) Train develop and motivate employees to improve current performance and to prepare for higher-level jobs. (10%)
- 4.) Evaluate the performance, review salaries and take personnel actions such as promotions, performance awards, demotions, etc. (5%)
- 5.) Would help maintain discipline, recommend and administer corrective action according to policy and procedures. (5%)

The petitioner submitted a "future management chart" indicating that the president would supervise a general manager, who, in turn, would supervise an accountant, a secretary, and "sales staffs." The chart indicates that a sales associate will report to the sales staff.

The petitioner also submitted position descriptions for the beneficiary's proposed subordinates, as follows:

GENERAL MANAGER

1. Is fully responsible to implement strategies and plans formulated by the President . . . . (40%)
2. Oversee all sales transactions executed by the sales associate with retailers and end consumers. (10%)
3. Review inventory requirement send in by sales department fortnightly and coordinates with the Principal for the purchase of the same. (5%)
4. Work with the accountant on a weekly basis with the payables and receivables report, to ensure the organizations ability to meet payables, payroll and expenses. (5%)
5. Identify problem areas in smooth running of the organization. Develop and recommend new policies and procedures for resolution. (5%)
6. Negotiation and liaison with shipping agent and various governmental organizations. (5%)
7. Defines and allocates budget, staff and other resources to accomplish objectives for organizational goals (10%)

8. Create monthly report for review by the President, in coordination with the Accountant, Sales Associate and Secretary. (5%)
9. Motivate and inspire staff to excel, appraise employees accurately, honestly, regularly exercising leadership characteristics. (5%)
10. Staffing and recruiting efforts to ensure high retention of staff. (10%)

#### SALES STAFFS

1. **Plan sales** strategies for each client on a quarterly basis and set sales target for each based on particular client profile. (30%)
2. Manage Sales associate, retailers, direct customers and new territories to achieve Sales target. (20%)
3. Decide with input from sales associate, inventory and pricing to maximize revenue to achieve and exceed revenue goals. (10%)
4. Create and present special presentation to important clients. (10%)
5. Develop relationship in market via frequent visibility by being active in sales going to Trade shows and entertaining important clients. (10%)
6. Sit with principal's designer based in NY to give valuable inputs on creation of new designs in an effort to increase sales. (10%)
7. Influence sales associate by winning their support and by motivating and inspiring her effort. (5%)
8. Submit monthly sales report and market analysis to the General Manager. (5%)

#### SALES ASSOCIATE

1. Open and maintain client accounts in the database system. (10%)
2. Act as primary resource and contact for client. (20%)
3. Meet clients regularly, quote prices, make sales and draw terms of contract. (25%)
4. Perform periodical inventory evaluation and send requirements to Sales Staff. (10%)
5. Research markets for new territories to make sales to meet target. (15%)
6. Evaluate customer satisfaction and give feedback to Sales Staff. (10%)
7. Manage shipping and handling of goods both to client and trade shows. (10%)

#### ACCOUNTANT

1. Prepare journal entry, maintain daily account register of the corporation, and keep a check on the cash flow. (30%)
2. Enter data in accounting package and keeps financial aspect up to date (10%)
3. Make invoices to be billed to the customer and keep a track on the outstanding (10%)
4. Liaisons with bank and other governmental bodies. (10%)
5. Prepare profit and loss account and balance sheet to be submitted to the CPA. (10%)
6. Analyze and interpret accounting data and prepare monthly account report to be submitted to the General Manager. (10%)
7. Prepare internal audit of account systems and procedures. (10%)
8. Prepare employee payroll. (10%)

The petitioner indicated that the secretary would perform general administrative and clerical office work.

The director issued a request for additional evidence on December 31, 2007, instructing the petitioner to submit a comprehensive description of the beneficiary's proposed duties and a complete position description for all proposed employees, including a breakdown of the number of hours to be devoted to each employees' job duties on a weekly basis and whether or not they require a college education. The director also requested documentary evidence to establish that the petitioner is prepared to operate an international trade business, including a business license, documentary evidence identifying the petitioner's import and export brokers, a list of assets that have been purchased by the U.S. company, and samples of advertising placed by the company.

In response, the petitioner resubmitted the above-referenced position descriptions for the beneficiary and his subordinates. The petitioner submitted a copy of its Certificate of Authority issued by the New York State Department of Taxation and Finance in June 2007, and copies of its Form ST-102-MN, New York State and Local Quarterly Sales and Use Tax Return for the second and third quarters of 2007, which covered the period between June 1 and November 30. The tax returns identify [REDACTED] as the petitioner's president and show that the company had gross sales of nearly \$400,000 during this period. The petitioner also submitted a power of attorney appointing [REDACTED] as the petitioner's custom clearance provider. This document was signed by [REDACTED] in his capacity as president and the beneficiary signed the document as a witness.

The director denied the petition on April 25, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of approval of the petition or that the petitioner would support such a position. The director noted that the beneficiary was the only employee identified on the petitioner's organizational chart, while every other employee was listed as "to be hired." The director found the beneficiary's position description alone insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director further observed that it is not clear from the record who would be responsible for the organization's day-to-day sales and services, nor was it established that the beneficiary's subordinates would be professionals.

On appeal, counsel for the petitioner asserts that the director incorrectly concluded that the petitioner failed to identify any other employees to be hired by the company. Counsel emphasizes that the petitioner submitted a "future management chart," for the petitioner's new office, and only identified the beneficiary's name because the other employees would be hired only after the beneficiary assumes his position as president of the company.

Counsel further objects to the director's conclusion that the petitioner failed to provide a description of the beneficiary's duties sufficient to establish that he will be employed in a primarily managerial or executive capacity. Counsel asserts:

As the President, [the beneficiary] has full responsibility for the company's inventory of Gemstones. Inventory decisions of such magnitude are reserved for top management individuals such as [the beneficiary] who have the necessary experience in marketing and pricing of Precious & Semi-Precious Stones.

As President, [the beneficiary] functions at a senior level in the Organization. He has full executive and managerial responsibility for the company's operations. The position of President represents the top executive position in the United States and is vested with full decision-making

authority. He is solely responsible for the management of the US-based marketing and import operations.

The beneficiary is responsible for directing the professional activities of a General Manager employed by the company as well as managing the Accountant, Sales Staff and Secretary. So [the beneficiary] will be managing a subordinate staff of professional personnel, who will relieve him from performing non-qualifying duties.

Counsel asserts that the beneficiary is responsible for directing "several major functions" of the company including purchasing and marketing functions, and therefore will be employed in a primarily managerial capacity. Counsel asserts that while the beneficiary will be responsible for hiring and firing employees, and managing professional employees, the number of employees to be supervised should not be the determining factor in analyzing the beneficiary's employment capacity.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the

business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

*Id.*

For several reasons, the petitioner in this matter has failed to establish that the United States operation will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner has failed to sufficiently describe both the beneficiary's and his subordinates' proposed duties after the petitioner's first year in operation, and has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C).

First, the petitioner has failed to establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has provided a lengthy, yet vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis after one year in operation. The fact that the petitioner has given the beneficiary an executive title and has prepared a vague job description which largely paraphrases the statutory definitions of managerial and executive capacity is not sufficient. For example, the petitioner indicated that the beneficiary will allocate 60 percent of his time to "executive duties" but did not adequately explain such duties. The petitioner indicated that he will "plan, develop and establish policies and goals of the business organization" and "ensure realization of business of the organization through a well-structured progress review system," but it did not adequately articulate the specific tasks associated with these duties. 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).

The petitioner indicated that the beneficiary would allocate the remaining 40 percent of his time to "managerial duties." The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). All of the beneficiary's claimed managerial duties, as described prior to the adjudication of the petition, are related to the supervision of subordinate personnel, and therefore are qualifying duties only if the petitioner establishes through persuasive evidence

that it realistically intends to hire managerial, supervisory and/or professional personnel by the end of its first year of operations.

The petitioner has not submitted a business plan, hiring plan or other timeline for hiring staff, financial projections, or any other evidence that would corroborate the "future management chart," submitted with the petition, nor has it ever specifically stated that the proposed positions would be filled by the end of the first year of operations. Therefore, while the chart depicts a total of six positions and two tiers of managerial or supervisory employees below the beneficiary's proposed position (the general manager and the sales staff), the AAO cannot accept the chart alone as evidence that the beneficiary would supervise managerial or supervisory staff within one year. 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)).

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of its general manager, accountant, secretary, or sales staff. 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 proposed employees would possess or require a bachelor's degree, such that they could be classified as professionals.

On appeal, counsel for the petitioner has introduced additional responsibilities to the beneficiary's job description, noting that he will have full responsibility for managing the purchasing and marketing functions as well as managing import operations and having full responsibility for inventory decisions. 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 position description detailing the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 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.

Here, the claim that the beneficiary would be a function manager was introduced on appeal, with no accompanying detailed position description explaining the duties to be performed in managing the claimed functions. The beneficiary's managerial responsibility for import and purchase functions was not even mentioned in the petitioner's initial description. If the petitioner believes that the beneficiary qualifies for the benefit sought as a function manager, it should have offered this argument prior to the adjudication of the petition. The petitioner was given an opportunity to clarify the beneficiary's job duties in response to the request for evidence, but failed to do so, instead opting to resubmit the initial job description that was already found by the director to be insufficient. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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 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). Here, the position description provided falls significantly short of establishing that the beneficiary's primary duties would be managerial or executive in nature.

Furthermore, there is evidence in the record that leads the AAO to question the beneficiary's actual level of authority within the organization. As noted above, there are other documents in the record identifying [REDACTED] as the petitioner's president. Clearly, the petitioner does not require two presidents. Furthermore, the record shows that the petitioner had been operating for several months prior to filing the petition, achieving sales of nearly \$400,000, yet the petitioner does not claim to have any filled any of the positions on its proposed organizational chart. This raises questions as to whether the petitioner even requires the proposed staff in order to operate its gemstone import and wholesale business. 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. 582, 591-92 (BIA 1988). 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. *Id.* at 591.

As noted above, the deficiencies in the beneficiary's job description, combined with the lack of a business plan or other evidence laying out the petitioner's hiring plan and financial goals for its first year of operations, undermine the petitioner's claim that the beneficiary will be employed in a primarily managerial or executive capacity within one year. The petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C). Accordingly, the appeal will be dismissed.

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.