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U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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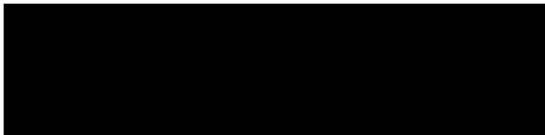
File: WAC 08 236 50885 Office: CALIFORNIA SERVICE CENTER Date: SEP 02 2009

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.

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, California 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 Philippines corporation, states that it intends to operate a branch office known as "Golden Cuisine" in the State of California. The petitioner seeks to employ the beneficiary as the manager of its new office 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.

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, the petitioner asserts that it submitted sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of approval. The petitioner emphasizes that the company is committed to hiring ten full-time employees during its first year in operation.

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.

As a preliminary matter, the AAO notes that the director erred by adjudicating the instant matter as a petition involving an established U.S. entity, rather than applying the regulations pertaining to new offices at 8 C.F.R. § 214.2(l)(3)(v). 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)(B).

Accordingly, the director's analysis of the beneficiary's proposed position was flawed as it did not take into account the petitioner's business plan and other evidence submitted to establish that the U.S. company would support a managerial or executive position within one year. The director's analysis with respect to the petitioner's current staffing levels will be withdrawn; however, the AAO concurs with the director's ultimate conclusion that the beneficiary will not be employed in a primarily managerial or executive capacity. As the

AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). As discussed further below, a review of the record of proceeding reveals that there are multiple grounds to support the denial of the instant petition, and it would serve no useful purpose to remand the matter to the director.

The first issue to be addressed 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 August 29, 2008. The petitioner submitted a statement describing the beneficiary's proposed duties as manager as the following:

1. Manage the operational and fiscal activities of the restaurant to include: staffing levels, budgets, and financial goals.
2. Plan and develop systems and procedures to improve the operating quality and efficiency of the restaurant.
3. Analyze and document business processes and problems. Develop solutions to enhance efficiencies.
4. Coordinate and implement solutions from process analysis and general restaurant projects.
5. Direct staff in the development, analysis and preparation of reports.
6. Supervise staff in accordance with company policies and procedures.
7. Conduct interviews, hire new staff, and provide employee orientation.
8. Coach and provide career development advice to staff.
9. Establish employee goals and conduct employee performance reviews.
10. Responsible for staff scheduling to include: work assignments/rotations, employee training, employee vacations, employee breaks, overtime assignment, back-up for absent employees, and shift rotations.
11. Assist staff to resolve complex or out of policy operation problems.
12. Coordinate with Human Resources for appropriate staffing levels.
13. Schedule and conduct department meetings.
14. Responsible to meet restaurant productivity and quality goals.
15. Communicate with Supervisors, Managers and Vice Presidents on restaurant operations.
16. Complete human resources paperwork.
17. Other duties as assigned.

The petitioner submitted a business plan for "Golden Cuisine Restaurant and Catering Services" which indicates the petitioner's intent to open a Pacific-Asian Chinese restaurant. The business plan includes a narrative description of the intended business and information regarding the beneficiary's background, and also outlines the restaurant's equipment requirements, physical premises requirements, accounting methods, financing strategy, acquisition strategy, and marketing plans.

The director issued a request for additional evidence on October 8, 2008, in which she requested, *inter alia*, a more detailed description of the beneficiary's duties in the United States, and a copy of the company's organizational chart, to include job titles and duties for all positions under the beneficiary's supervision.

In a response received on November 19, 2008, the petitioner provided a proposed organizational chart for "Saludes Golden Son, Inc.," an entity incorporated in the State of California on November 3, 2008. The chart is accompanied by a list of proposed employees. The petitioner indicates that its restaurant operations department will include a chef, two cooks, two cashiers, a head waiter, five waiters, two busboys, a dishwasher and a janitor.

The petitioner indicated that it also intends to employ a marketing manager, and two commissioned account representatives in its marketing department. The petitioner also stated that it will have a general merchandise department with a store manager, a purchaser, two cashiers and four sales assistants. The total number of full-time employees anticipated is 25. The petitioner provided the names of individuals who would serve as chef, marketing manager, and store manager, and indicated that the beneficiary and members of his family would hold the "administration"/officer positions, including CEO, CFO, COO and Corporate Secretary. The petitioner submitted brief job descriptions for all positions identified on the organizational chart.

The petitioner also submitted the minutes of a director's meeting held in the Phillipines on March 3, 2007, in which it was approved that the beneficiary and [REDACTED] be authorized to explore feasible business options in California. The board decided on a budget of \$50,000 "to be deposited from time to time to the dollar account of [REDACTED]" The petitioner provided a certificate issued by the Philippines entity on November 10, 2008, indicating that the company sent monies totaling \$27,700 to the savings account of its president, [REDACTED] for the expenses of the new U.S. business. The certificate lists 29 cash transfers ranging from \$100 to \$3,800, made between August 14, 2007 and November 7, 2008. The petitioner also submitted cash deposit receipts as evidence that such funds were deposited in the joint account held by [REDACTED] and the beneficiary, her spouse.

The director denied the petition on December 1, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. As discussed, insomuch as the director's decision was primarily based on a finding that the majority of the positions in the company were unstaffed at the time of filing, the director's analysis will be withdrawn. However, the director also found that the petitioner's description of the beneficiary's duties provided insufficient detail regarding the actual duties to be performed and the percentage of time he would devote to specific tasks.

On appeal, the petitioner asserts that "it has the ability and realistic goal of being able to support" a managerial or executive capacity position "within a reasonable period of time." The petitioner further describes the beneficiary's proposed duties as the following:

[The beneficiary] will fill the position of Chief Executive Officer and President of Saludes Golden Son, Inc. He will handle the overall sales and marketing for the company for the time being as well as maintaining the client and vendor relations of the company. Moreover, he will supervise, manage, and coordinate with all of [the] department heads to ensure the smooth overall operation of the company.

Moreover, [the beneficiary's] job duties include recruitment and training of essential personnel for Saludes Golden Sun Inc. which means all department heads and professional [sic] with specialized work experience. . . . He will exercise unfettered discretion over the work performed by company personnel within the departments as soon as the department heads are properly trained and learn the duties and responsibilities of their department that they will handle or their scope of work.

Furthermore, [the beneficiary] will supervise, manage and coordinate the financial and administrative aspects of the company. Duties will include the supervision and communication

with outside contractors such as public accountant, bookkeeper, attorney and manufacturing vendors. In a few months, the company and [the beneficiary] intends to hire additional full time employees to be added to the Restaurant, Sales and Marketing division and [they] will be supervised by him. Within a year, the company is committed to hiring TEN (10) full time staff in its U.S. office.

Upon review, the petitioner's assertions and additional evidence are not persuasive in establishing that the United States operation will support a managerial or executive position within one year.

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 the beneficiary's proposed duties after the petitioner's first year in operation; has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office; and has failed to establish that a sufficient investment has been made in the United States operation. *See* 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's description of the beneficiary's proposed duties is insufficient to establish that his duties will be primarily managerial or executive in nature. Most of the duties described at the time the petition was filed were related to recruiting, hiring, training, scheduling, coaching and supervising restaurant staff. The petitioner has since stated that the beneficiary's personnel responsibilities will be limited to hiring and training "department heads" for the restaurant, marketing and general merchandise departments. However, as discussed further below, the petitioner has not adequately described its hiring plan and it cannot be concluded that the beneficiary would be supervising subordinate managers or supervisors within one year. 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).

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(1) requires the petitioner to provide evidence regarding the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals. While the petitioner provided a proposed organizational chart for the U.S. company and job descriptions for proposed positions, the petitioner must also establish that there is a realistic expectation that sufficient staff will be hired within one year to relieve the beneficiary from performing the non-qualifying duties associated with operating a restaurant. The petitioner's business plan does not address the company's

proposed hiring plan or staffing plan, and does not contain any financial projections or goals. The petitioner indicates on appeal that it intends to hire ten full-time employees during the first year of operations, but it has not identified which positions would be filled within that timeframe. 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)). Given the petitioner's indication on its organizational chart that it intends to operate both a store and a restaurant and hire more than 20 employees, it is unclear how ten employees could be expected to adequately staff two businesses. Furthermore, without evidence related to the petitioner's financial objectives, the evidence does not support a finding that the petitioner could feasibly compensate ten full-time staff within one year.

The AAO acknowledges that the petitioner identified the names of employees who would serve as chef, store manager and marketing manager. However, the petitioner did not provide evidence to establish that such employees have actually been offered employment with the company or that they have already been hired. Again, 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. at 165.

Second, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because it failed to establish that a sufficient investment was made in the enterprise. 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The evidence of record indicates that the foreign entity provided the beneficiary and his spouse with \$27,700 in cash to cover expenses associated with establishing a business in the United States, and that up to \$50,000 has been budgeted for this purpose. However, there is no evidence that there was any investment in a U.S. entity at the time of filing, nor is there any evidence of the anticipated start-up costs associated with the new office in the United States.

Finally, as discussed further below, the evidence of record shows that there was no legal entity established in the United States at the time the petition was filed, nor did the petitioner provide evidence that it had leased premises sufficient to house the new office. These factors further undermine a determination that the proposed enterprise would 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. Rather, it is unclear when the petitioner would realistically be able to even open a restaurant, given the need to first incorporate a U.S. entity, locate suitable premises, and obtain the necessary licenses and permits to operate a food service business.

Accordingly, 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), and the petition may not be approved for the above reasons.

Beyond the decision of the director, the AAO finds that the petitioner did not establish that it has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The record shows that the beneficiary's spouse, [REDACTED], signed a lease for a single family residence located at [REDACTED] in October 2007. The premises are to be used for no other purpose. According to the business plan submitted, the U.S. entity will require a 1,500 square foot premises with a kitchen and a room for private parties. It is evident that the petitioner cannot operate a restaurant or

any business from its leased residential premises. Accordingly, the petitioner has not met this evidentiary requirement.

Another issue not addressed by the director is whether there is a qualifying organization in the United States, and whether the petitioner, a Philippines corporation, has a qualifying relationship with the new U.S. entity. 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).

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

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

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner stated on Form I-129 that the U.S. entity is a branch office of the foreign entity, Vision in Life Philippines, Inc. At the time of filing, the petitioner referred to the U.S. entity as "Golden Cuisine." The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). USCIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick, supra* at 649-50.

Probative evidence of a newly-established branch office would include a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of a lease for office space in the United States; or state tax forms that demonstrate that the petitioner is a branch office of a foreign entity. The petitioner submitted none of this evidence.

Rather, the record shows that a U.S. entity, Saludes Golden Son, Inc., was incorporated by the beneficiary in California on November 3, 2008, more than two months after the petition was filed. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). As in the present matter, if the petitioner is a foreign entity with no branch office in the United States and no qualifying ownership interest in a U.S. entity, there is no U.S. entity to employ the beneficiary and no qualifying organization. For this additional reason, the petition cannot be approved.

The AAO notes that the fact that a U.S. entity was incorporated after the date of filing is irrelevant. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). However, even assuming *arguendo* that the California corporation had been established at the time of filing, the evidence submitted does not establish that the U.S. and foreign entities have a qualifying relationship. The U.S. company, Saludes Golden Son, Inc., is wholly-owned by the beneficiary. The petitioning company, Vision in Life Philippines, Inc. is owned by ten shareholders, and the beneficiary holds only a 28.5% interest in the company. The two entities do not have the degree of common ownership required to establish an affiliate relationship.

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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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 at 1043.

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.