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U.S. Citizenship and Immigration Services
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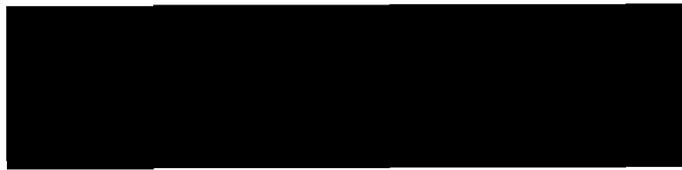
Date:

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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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 appeal will be dismissed.

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 Florida corporation established in 2008 that intends to operate a coffee import and export business. It claims to be an affiliate of [REDACTED], located in Guatemala. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a two-year period.¹

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director also noted that the petitioner failed to provide a lease agreement for the U.S. entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence submitted demonstrates that the beneficiary will be employed in an executive capacity. Counsel contends that the director "went to great lengths to show that the Beneficiary will not be employed in a managerial capacity," and suggests that the director did not give proper consideration to whether the beneficiary would be employed in an executive capacity. 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.

¹ Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (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 to 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, while the director acknowledged that the petitioning company, which was established in June 2008, approximately six months before the petition was filed, is a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F), the director did not cite to the regulations applicable to new offices at 8 C.F.R. § 214.2(l)(3)(v)(C). However, the AAO concurs with the director's conclusion that the petitioner failed to establish that the beneficiary will be employed in the United States 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 pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C). 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). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The primary issue to be addressed is whether the petitioner established that it will employ the beneficiary in a primarily managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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 one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first 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 low-level 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 that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

The petitioner filed the nonimmigrant petition on November 28, 2008. In a letter dated November 25, 2008, the petitioner stated that the beneficiary will perform the following duties as president of the United States company:

He will oversee the overall performance of the affiliate branch, ensuring the policies and procedures are maintained, as well as he will implement strategic plans for capital investments needed to achieve the company's goals in the most effective and time efficient manner. He will identify and measure key performance indicators for the company, its divisions and departments. He will analyze business unit performance, and benchmark key performance indicators (35%)

In terms of human resources management, [the beneficiary] will conduct performance reviews and ensure that the staff and crew will follow corporate procedures and policies. He will likewise supervise the work of functional employees. He will exercise direct supervision over the key employees of our affiliate, and he will have the authority to implement personnel actions with the aforementioned-employees such as hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals. (10%)

[The beneficiary] will develop and direct the management of [the petitioner] to ensure that all relevant business operations are continuously monitored and maintained. His assignment's purpose is to secure that the company will continue to apply and further develop all importation and distribution activities for the products. As the President, [the beneficiary] will ensure smooth transition, stable and time-tested implementation of policies. He will implement and oversee the overall importation procedures and distribution of products, setting-up various operations processes in relation to the quality control and customer service, specifically developing and implementing production tracking and quality control systems, analyzing production, quality control, maintenance, and other operational reports to detect production problems. (25%)

He will create and implement program/company-wide protocols and be responsible, with respect to all matters within his authority, to exercised [*sic*] broad discretion over the day-to-day operational functions of [the petitioner] to establish the most advantageous course of action for the successful management and direction of [the U.S. petitioner] and [the foreign entity] in Guatemala (30%).

The petitioner submitted a personnel list which included the beneficiary and a vice president. The petitioner did not describe the proposed nature of the office, the scope of the entity, its organizational structure, and its financial goals, nor did it provide evidence of the size of the United States investment, as required by 8 C.F.R.

§ 214.2(l)(3)(v)(C). The petitioner provided copies of bank statements for the months of June through September 2008. The most recent statement showed a balance of approximately \$20,000 as of September 30, 2008.

The director issued a request for additional evidence (RFE) on December 3, 2008, in which the director requested, *inter alia*, the following: (1) a comprehensive description of the beneficiary's proposed duties; (2) a list of the United States employees, including position titles and complete position descriptions for all employees, including a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis; and (3) educational requirements for all positions in the United States. The director also requested evidence of business conducted at the address listed on the petition, phone records, copies of advertisements, evidence of wages paid to employees, and documentary evidence of the U.S. company's international trade activities.²

In response to the RFE, counsel for the petitioner submitted a position description for the beneficiary that is identical to the description included in the petitioner's letter dated November 25, 2008. Counsel noted that much of the requested evidence could not be submitted because the petitioner has not yet engaged in any business dealings. The petitioner did provide a proposed employee list which indicates vacancies for a coffee taster, customs agent, logistics manager, accountant, broker assistant, delivery personnel, and secretaries. The employee list indicates that the beneficiary will hold the positions of president and commodities broker. Counsel stated that complete job descriptions for the vacant positions "are not yet available as they are subject to change." She stated however, that each potential employee would work full-time and would need to have a bachelor's degree.

The petitioner submitted two receipts for office equipment and supplies purchases in the amount of approximately \$900 as evidence of the start-up costs of the company.

The director denied the petition on January 24, 2009, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director emphasized that the petitioner failed to provide the requested detailed position description for the beneficiary and neglected to provide any position descriptions for his proposed subordinates. Therefore, the director found that the petitioner failed to establish that the beneficiary would be involved in the supervision of a subordinate staff of supervisory, managerial or professional employees who would relieve him from performing the services of the corporation.

On appeal, counsel for the petitioner asserts that the director primarily considered whether the beneficiary would be employed in managerial capacity, but failed to consider whether he would be employed in an executive capacity. Counsel quotes portions of the job description previously provided for the beneficiary and asserts that the duties described fall within the statutory definition of executive capacity at section 101(a)(44)(B) of the Act. Counsel emphasizes that the day-to-day operations of the petitioner's business consist of high-valued business transactions which require the experience of an executive and "will

² The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that the beneficiary is *not* coming to the United States to open a new office. It appears that this misleading statement on the Form I-129 lead to some initial misunderstanding on the part of the director as to the operational status of the U.S. company. The petitioner acknowledges that the recently-established U.S. entity has not commenced any business activities in the United States.

unequivocally involve the exercise of wide latitude in discretionary decision-making . . . necessitating a position where one has the freedom to act fast and independently." Finally, counsel asserts that the position will require the beneficiary's "extensive experience in navigating the import/export and commodities trading markets, as well as intimate experience with assessing the nuances of various aspects of coffees."

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity within one year.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. As discussed above, the petitioner's 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

In the instant matter, the petitioner's description of the beneficiary's proposed duties, while lengthy, is too vague and non-specific to establish that he will be employed in a primarily managerial or executive capacity within one year. For example, the petitioner indicates that the beneficiary "will oversee the overall performance of the affiliate branch," ensure that "policies and procedures are maintained," "implement strategic plans," "develop and direct the management of [the petitioner]," and "create and implement program/company-wide protocols," and "exercise broad discretion over the day-to-day operational functions." These statements merely paraphrase the statutory definition of executive capacity and provide little insight into the nature of the beneficiary's proposed duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The director advised the petitioner of the deficiency of this description by requesting that it provide a "comprehensive description" of the beneficiary's proposed duties. Rather than clarifying the nature of the beneficiary's day-to-day duties, counsel re-submitted the exact same general description in response to the RFE. 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). Although the director denied the petition, in part, based on the petitioner's failure to submit a detailed position description, counsel once again relies on the same vague job description to support her contention on appeal that the proposed position will be executive in nature. The AAO will not accept a vague job description that paraphrases the statutory definition of executive capacity in lieu of the required detailed description. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the

course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Furthermore, in response to the RFE, the petitioner indicated that the beneficiary would be serving as both president of the petitioning company, and as a commodities broker. The petitioner did not provide a description of the duties the beneficiary would perform in this secondary role, nor did it indicate how his time would be allocated between the two positions. 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)). Therefore, the job description provided by the petitioner must be considered incomplete in addition to being deficient for the reasons discussed above.

The totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. The regulations specifically require the petitioner to provide information regarding the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals. 8 C.F.R. § 214.2(l)(3)(v)(C)(1). The petitioner has provided no business plan, no financial plan, and no hiring plan to demonstrate its anticipated growth during the first year of operations. Although the petitioner has provided a list of nine positions to be filled, the petitioner has not indicated when these workers would be hired. Furthermore, the director specifically requested position descriptions for all proposed employees, which the petitioner stated it is unable to provide. Absent information regarding the number and types of workers to be hired during the first year of operations and the company's ability to support the hiring of such subordinate staff, the AAO cannot conclude that the beneficiary would be relieved from performing primarily non-qualifying duties within one year.

The minimal evidence does not in fact establish a reasonable expectation that the business will rapidly expand to the point where it requires a manager or executive to primarily perform the high-level duties contemplated by the statutory definitions.

A related issue not addressed by the director is whether the petitioner provided sufficient evidence of the size of the financial investment in the new United States office, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The evidence submitted on appeal indicates that the petitioner had approximately \$20,000 in its checking account at the time of filing. The petitioner has not provided a business or financial plan or otherwise outlined its anticipated capital requirements and start-up costs, and it is thus impossible to evaluate whether the petitioner has sufficient funds to commence business operations.

Therefore, the AAO's review of this issue is severely restricted by the petitioner's failure to submit evidence or information regarding the beneficiary's proposed duties, the proposed nature of the office, the anticipated scope of the entity, and its financial goals, as required by 8 C.F.R. § 214.2(l)(3)(v)(C). While a business plan is not explicitly required by the regulations, the petitioner has provided no explanation regarding the intended scope of the organization or its financial goals, no timeline for hiring additional employees, insufficient evidence of the size of the investment required for start-up operations, and no financial objectives or projections for the company's first year of business. 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. The AAO cannot speculate as to when or how many employees might be hired or otherwise determine how many employees the company would support at the end of the first year of

operations, or who would be performing the day-to-day, non-managerial and non-executive functions of the business.

The AAO does not doubt that the beneficiary will have supervisory authority over the petitioner's business. However, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Overall, the vague job description provided for the beneficiary, the lack of detail regarding the petitioner's business plan and hiring plan for the first year of operations, considered with the lack of evidence of the size of the U.S. investment, prohibits a determination that the petitioner could realistically support a managerial or executive position within one year. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the AAO finds that the record as presently constituted contains insufficient evidence that the petitioner has secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

At the time of filing, the petitioner submitted a [REDACTED] executed in Guatemala in September 2005 between the foreign entity and "U.S. Postal." The contract, which is not accompanied by an English translation, appears to provide the company with a U.S. post office box and physical mailing address in Miami, Florida. The address listed in the contract is the same address listed as the beneficiary's U.S. worksite on the Form I-129. However, this contract is not a lease agreement, and there is no apparent physical premises associated with the contract.

In response to the RFE, the petitioner submitted a license agreement for a 180 square foot office located in Panorama City, California. The license agreement was executed in December 2008, subsequent to the issuance of the RFE, and had a commencement date of February 1, 2009. 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).

Therefore, the petitioner has not established that it had secured any physical premises to house the new office as of November 2008 when the petition was filed. For this additional reason, the petition cannot be approved.

Another issue not addressed by the director is whether the petitioner established that the U.S. company and the foreign entity have a qualifying relationship. 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 states that the petitioner and the foreign entity are affiliates based on common majority ownership by the beneficiary. The petitioner submitted the foreign entity's bylaws, with English translation, indicating that the beneficiary owns 60 percent of the company's issued shares. However, the record as presently constituted does not contain any documentary evidence of the beneficiary's claimed ownership of 70 percent of the petitioner's shares. 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. The petition cannot be approved for this additional reason.

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). As noted above, 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). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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. 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.