



U.S. Citizenship  
and Immigration  
Services

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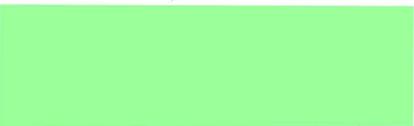


DATE: **FEB 28 2013** Office: VERMONT SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
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 qualify 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 Texas limited liability company established in December 2009, states it is engaged in the produce import business. It claims to be wholly owned subsidiary of [REDACTED] located in Mexico. The petitioner seeks to employ the beneficiary as the president of a "new office" in the United States for a period of one year.<sup>1</sup>

The director denied the petition finding that the record failed to establish that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity or that he will be employed by the petitioner in a managerial or executive capacity.

On appeal, counsel for the petitioner provides a more detailed explanation of the beneficiary's duties and further articulates how he qualifies as a manager or executive under the Act.

### I. The Law

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.

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<sup>1</sup> The petitioner will be treated as a "new office" in the United States consistent with the regulatory definition at 8 C.F.R. § 214.2(l)(1)(ii)(F) and the evidentiary requirements at 8 C.F.R. § 214.2(l)(3)(v). The petitioner submits on the record that the business in the United States suspended operations in July 2010 after conducting business activities for a period of approximately seven (7) months. The petitioner states it will resume operations through new investment on the part of the beneficiary's foreign employer which claims to have purchased the petitioner from the company's founding partners.

- (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) further 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 involved 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.

## **II. The Issues on Appeal:**

### **A. Employment in the United States in a managerial or executive capacity**

As noted, the director denied the petition based on the petitioner's failure to establish that the beneficiary would act primarily in a managerial or executive capacity in the United States. Upon review of the record, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be likely to support the claimed executive or managerial role of the beneficiary after 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 "new office" provision was meant as an accommodation for newly established enterprises and provided for by U.S. Citizenship and Immigration Services (USCIS) regulation to allow 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.

However, 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). 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.*

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. 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).

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that the beneficiary would be "managing the operations of the company, purchases, sales, imports and delivery of merchandise." In response to the director's Request for Evidence (RFE), the petitioner provided the following duty description for the beneficiary in his role as President:

[The beneficiary] should make decisions to ensure growth and profit generation, such as:

- Decide which products to sell based on price analysis.
- Credit approval for new customers
- Decide the Investment Plan of the Company
- Approval of purchases of new products considering cost and market demand
- Recruitment of new staff
- Evaluate and make the final decision of future negotiations for the growth of the Company

The petitioner further elaborated by setting forth the following proposed responsibilities:

- Manage finances and resources of the Company.
- Direct the overall operations of the Company.
- Manage an accurate inventory control and entry and exit of goods.
- Negotiate new contracts with customers and suppliers.
- Innovating techniques to increase sales and gain more market share.

- Evaluate results of Company in monthly closing meetings.
- Defining responsibilities of staff in each area and evaluate their performance
- Approve staff training plans such as: sales training, marketing, international business, English-Spanish skills, and everything they need for continuous improvement of the Company

Lastly, the petitioner provided the following breakdown of hours devoted to specific duties during a 40-hour work week:

2 hrs.	Conduct weekly meeting goals
1 hrs.	Conduct monthly meeting results (4 hrs. once a month)
5 hrs.	Perform daily meetings with sales staff
12 hrs.	Make negotiations with customers and suppliers
10 hrs.	Visit and meet major clients
5 hrs.	Review financial statements and bank account
5 hrs.	Review status of billing and collection

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Here, the petitioner submits duties and responsibilities reflecting that the beneficiary will primarily perform day-to-day operational duties and not primarily managerial or executive duties. For instance, several of the beneficiary's listed duties in the various duty descriptions do not fall directly under traditional managerial duties as defined in the statute, such as conducting negotiations with customers and suppliers; reviewing the status of billing and collection; managing the inventory of the company; conducting credit approval for new customers; and purchasing products for sale. In fact, the aforementioned non-qualifying duties are predominant within the various duty descriptions offered for the beneficiary. Additionally, the petitioner suggests directly on the record that the beneficiary will devote at least half of his time to non-qualifying duties by stating, "The time as President is distributed as follows: "50% in executive administrative activities and 50% no-administrative activities like visit customers." Also, the petitioner submits evidence on appeal that further indicates that the beneficiary will primarily perform day-to-day operational duties. For example, the petitioner offers on appeal that the beneficiary will be directly involved with all expenditures, billing, collections and bank deposits, and the purchase of all equipment, trucks, and company expenses. In sum, due to the predominance of non-qualifying duties in the beneficiary's various duty descriptions, it cannot be found that the petitioner has established that the beneficiary will primarily perform managerial or executive duties after one year.

Thus, while some of the duties described by the petitioner may generally fall under the definitions of managerial or executive capacity, the predominance of non-managerial and non-executive duties in the duty descriptions raises questions as to the beneficiary's actual proposed responsibilities. Overall, the position descriptions alone are insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. employer would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, 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.

In analyzing the totality of the record, the evidence presented does not support a finding that beneficiary will be primarily performing executive or managerial duties within one year, as the petitioner has not provided sufficient evidence to document its specific plans for investment in the United States and the financial status of the foreign employer. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(2) states that the petitioner support a new office position with information regarding 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 immediately upon approval. However, the petitioner has not provided any information on the level of investment in the United States or sufficient financial information on the foreign employer to confirm that it can support such a new enterprise. The petitioner only vaguely states that the beneficiary will be responsible for developing an investment plan, but no details on the record are provided as to the nature and extent of this investment plan. As previously noted, the petitioner admits on the record that the petitioner suspended its operations in July 2010; but does provide specific information regarding how the business will resume operations or supporting documentation related thereto. Without such evidence, it cannot be concluded with any certainty that the newly reinvigorated business will have a realistic expectation of success 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).

Additionally, it cannot be concluded that the petitioner will be capable of hiring the planned five employees in the first year necessary to relieve the beneficiary from primarily performing non-qualifying duties. The petitioner's business plan indicated that the company would hire only two employees during the first year of operations and indicates no projected increase in salary expenses until January 2013. Lastly, it also cannot be found that the petitioner will have sufficient financial solvency to remunerate the beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2).

In conclusion, when analyzing the totality of the record, the AAO cannot conclude that the record supports a finding that the beneficiary would be primarily employed in a managerial or executive capacity within one year. This conclusion is based the predominance of non-qualifying duties included in the beneficiary's duty description; the lack of specificity regarding investment in the petitioner; and the lack of evidence on the record related to the financial position of the foreign employer. For these reasons, the petition cannot be approved.

**B. Employment with the foreign employer in a managerial or executive capacity:**

The second issue addressed by the director is whether the petitioner established that the foreign entity has employed the beneficiary in a primarily managerial or executive capacity. See 8 C.F.R. § 214.2(l)(3)(iv).

As noted, 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.* In response to the director's RFE, the petitioner provided the following description of the beneficiary's duties with the foreign employer:

- Manage the finances and resources of the Company.
- Direct the operations of General Management, Sales agents and distributor.
- Manage the accurate control of inventory, and incoming and outgoing goods.
- Negotiate new contracts with customers,
- Innovating techniques to increase sales and gain more market share.
- Evaluate new business and new products.
- Human Resource Management for the selection and recruitment, as well as layoffs.
- Defining responsibilities of staff in each area and evaluate their performance.
- Provide training for staff to have dedication to service.
- Approve plans as staff training course sales, marketing, international business, English-Spanish, and everything you need for continuous improvement of the Company.

Again, 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 provided no specifics as to how the beneficiary carried out the general tasks and goals listed above as a part of his daily duties. In fact, portions of the duty description are so overly vague that they provide little or no probative value as to the beneficiary's day-to-day activities, such as directing operations of general management, sales agents, and distributors; innovating techniques to increase sales; evaluating new business and new products; or providing training for staff to have dedication to service. In each of the aforementioned cases and despite claiming to be in this role since 2000, the petitioner has not provided detail or supporting evidence related to these vague functions; such as operations directed, new products introduced, innovative techniques implemented, or specific trainings conducted. The general lack of specificity surrounding these offered duties calls into question whether the beneficiary is indeed primarily performing the managerial or executive duties listed. 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. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). 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. *Id.*

Further, 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 petitioner fails to document what proportion of the beneficiary's duties are managerial functions and what proportion are non-managerial, despite being specifically requested to provide this by the director. 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).

Instead, the petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as, managing inventory and negotiating contracts with customers, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive with the foreign employer. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

As such, due to the insufficiency of the beneficiary's foreign duty description, the petitioner has not established that has been employed abroad in an executive or managerial capacity. For this additional reason, the petition may not be approved.

### C. Qualifying relationship

Lastly, beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the foreign employer as required by 8 C.F.R. § 214.2(l)(3)(i).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (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[.]

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

\* \* \*

(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.

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 regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, the petitioner offers in the I-129 Petition for a Nonimmigrant Worker that the petitioner is 100% owned by [REDACTED] and that the two entities are affiliates. Noting the definitions of affiliates and subsidiaries above, it is clear that the petitioner is offered on the record as a wholly owned subsidiary of the foreign employer and not an affiliate, despite the petitioner's assertion on the Form I-129. The petitioner submits an updated sales agreement whereby the beneficiary purchased the petitioner for the foreign employer from four original partners in the amount of \$20,000. However, the petitioner provided an updated company registration for the petitioner filed on September 21, 2011, which reflects that the petitioner is owned by the beneficiary and an unidentified owner in Mexico; and not by the foreign employer as offered in the petition. 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).

Additionally, serious doubt exist regarding the aforementioned sale agreement due to it lacking a date and based on the lack of evidence that the \$20,000 purchase fee was actually paid by the foreign entity to the existing owners. The petitioner has not submitted the original or amended partnership agreement or operating agreement for review and has not adequately documented the claimed sale or current ownership of the company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Therefore, due to contradictions presented on the record related to the ownership of the petitioner it is not possible to conclude that a qualifying relationship exists between the petitioner and a foreign employer as required by the Act. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

### III. Conclusion

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. 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.