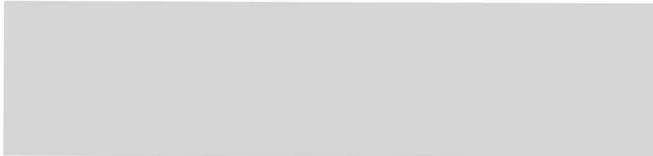




U.S. Citizenship
and Immigration
Services

(b)(6)



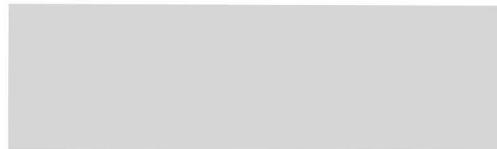
DATE: **AUG 28 2015**

PETITION RECEIPT #: 

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
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 appeal will be dismissed.

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker, seeking to classify 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 Florida corporation, is engaged in the import, export and sales of luxury vehicles. The petitioner claims to be a subsidiary of [REDACTED] located in Brazil. The petitioner seeks to employ the beneficiary as its executive director for a period of three years.

The director denied the petition on December 5, 2014, concluding that the evidence of record did not establish: (1) that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and (2) that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to our office. The petitioner submits a brief in support of the appeal.¹

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(1)(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 (1)(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.

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- (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.

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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

II. THE ISSUES ON APPEAL

A. U.S. Employment in an Executive Capacity

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying executive capacity in the United States. The petitioner does not claim that the beneficiary will be employed in a managerial capacity.

1. Facts

The petitioner filed the Form I-129 on October 6, 2014 and indicated that it has seven employees and eleven independent contractors in the United States and a gross annual income of \$2.2 million. The petitioner explained in a support letter that the beneficiary, as Executive Director, will “manage the expansion of the company in the United States,” and that his position is a “key executive position including the performance of full management over the company’s activities including all employees.” The petitioner further stated that the beneficiary “will completely direct overall management of the company and will manage the organization, supervise and control the work of

other supervisory employees, which includes a full time Manager.” Finally, the petitioner stated that the beneficiary will have the authority to hire and fire employees, exercise complete discretion over day-to-day operations, and make major decisions concerning financial relations with banks, suppliers and outsourced service providers such as accountants, attorneys and advertising agencies.

The petitioner explained that it is engaged in the retail sale, import/export, maintenance and rental of luxury vehicles, and noted its intent to “become a full reference center and tourist reception providing services that include leasing and sale of automobiles, concierge and money exchange.”

The petitioner submitted an organizational chart depicting a total of 18 employees and outsourced service providers. The chart depicts the positions of president, general sales manager, sales person, car financial advisor, administrative assistant, detailer and mechanic, and provides information regarding the wages or salary paid to each person identified. The petitioner noted that all of these staff are “subcontractors on site.” All other persons and entities depicted on the chart are identified as “subcontractors out site.” The petitioner included eleven individuals or shops that perform dent repair, detailing, painting, upholstery, interior and other automobile-related services.

The petitioner also provided a copy of its 2013 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates that the petitioner paid \$1,275 in salaries and wages. In addition, the petitioner submitted copies and/or transcripts of its IRS Forms 1120 for the years 2010 through 2012.

In a request for evidence (RFE) issued on October 16, 2014, the director requested additional evidence to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

In response to the RFE, the petitioner, in a letter dated November 20, 2014, provided the following description of the duties to be performed by the beneficiary in the position of executive director:

Specific Responsibilities: Percent Time: 27%

1. Assure that the organization has a long-range strategy which achieves its mission, and toward which it makes consistent and timely progress.
2. Provide leadership in developing program, organizational and financial plans with the Board of Directors and staff, and carry out plans and policies authorized by the board.
3. Promote active and broad participation by employees in every possible area of the organization’s work.
4. Maintain official records and documents, and ensure compliance with federal, state and local regulations.
5. Maintain a working knowledge of significant developments and trends in the field.

In communications, the Executive Director will: Percent Time: 19%

1. See that the shareholders are kept fully informed on the condition of the organization and all important factors influencing it.
2. Publicize the activities of the organization, its programs and goals.

3. Establish sound working relationships and cooperative arrangements with community groups and organizations.
4. Represent the programs and points of view of the organization to agencies, organizations, and the general public.

In relations with staff, the Executive Director will: Percent time: 21%

1. Be the ultimate authority for the hiring/firing employees and subcontractors.
2. Ensure that job descriptions are developed, that regular performance evaluations are held, and that sound human resources practices are in place.
3. See that an effective management team, with appropriate provision for succession, is in place.
4. Encourage staff and volunteer development and education, and assist program staff in relating their specialized work to the total program of the organization.
5. Maintain a climate which attracts, keeps, and motivates a diverse staff of top quality people.

In budget and finance, the Executive Director will: Percent time: 33%

1. Be responsible for developing and maintaining sound financial practices.
2. Work with the staff and the shareholder in preparing a budget; see that the organization operates within budget guidelines.
3. Ensure that adequate funds are available to permit the organization to carry out its work.
4. Conduct official correspondence of the organization, and execute legal documents.

The petitioner's president explained that he is leaving the company to accept another position and that the beneficiary, as executive director, will hold the senior position in the company and "be responsible for all financial, administrative and executive management" as well as developing expansion plans. He explained that the beneficiary will directly supervise the general sales manager and the administrative assistant and provided a brief description of the job duties performed by these two employees. In addition, the petitioner stated that the beneficiary will oversee the general sales manager and salesperson to ensure the expansion of the company's export activities in the areas of luxury vehicles and vehicle parts.

The director denied the petition on December 5, 2014, concluding, in part, that the petitioner did not establish that the beneficiary will be employed in a qualifying managerial or executive capacity.

On appeal, the petitioner asserts that the director did not properly examine the petitioner's evidence or adequately explain the reasons for denial of the petition. The petitioner asserts that the evidence of record establishes that it will employ the beneficiary in a qualifying executive capacity.

2. Analysis

Upon review, and for the reasons stated herein, we concur with the director's finding that the petitioner has not established that the beneficiary will be employed in a qualifying executive capacity in the United States.

When examining the executive or managerial capacity of the beneficiary, USCIS 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 were in either an executive or a managerial capacity. *Id.*

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 operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

As noted, the petitioner has consistently claimed that the beneficiary will be employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The petitioner initially provided a description of the beneficiary's job duties which included broadly stated job responsibilities that merely paraphrased the statutory definitions of both managerial and executive capacity. For example, the petitioner stated that he will "direct overall management of the company," "supervise and control the work" of supervisory employees, "exercise complete discretion over day-to-day operations," and "make all major decisions." 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.)

Although the petitioner provided a lengthy description of the beneficiary's proposed role in response to the RFE, it divided his responsibilities into four broad areas and did not include specifics regarding the types of tasks he would perform on a day-to-day basis. Specifically, the petitioner stated that the beneficiary would divide his time between budget and finance matters (33 percent), staff relations (21 percent), communications and public relations (19 percent), and miscellaneous matters which include long-range strategy, policy planning and development, regulatory compliance, and maintaining knowledge of developments in the field (27 percent). While many of the beneficiary's responsibilities, as generally described, are consistent with the statutory definition of executive capacity, the description is lacking in probative value due to its lack of detail and time

allocations to specific tasks. 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 not provided 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, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, 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 entity's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the foreign entity's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The petitioner claims to have seven employees, as well as eleven independent contractors who provide automobile-related services such as painting, detailing and repairs. The petitioner listed the employees by name on its organizational chart and indicated that the six payroll employees who would work subordinate to the beneficiary earn a total of \$133,031 in salaries and wages. While we acknowledge that the petition was filed during the fourth quarter of 2014, the evidence of record indicates that the petitioner paid only \$1,275 in salaries and wages in 2013, no wages in 2012 or 2011, and \$84,463 in salaries and wages in 2010. Further, the record does not include evidence of any payments made to independent contractors. Therefore, although the petitioner listed a total of 18 employees and contractors on its organizational chart, there is insufficient evidence that the petitioner actually employed the listed staff and contractors at the time of filing. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In addition, the petitioning retail car dealership claims to have only two sales staff – a general sales manager and a sales person – and indicates that both of these employees will also spend a significant amount of time on activities related to the export of cars to buyers in Brazilian and Latin American markets, as the company has no dedicated import/export staff. The petitioner has not explained how two sales employees are sufficient to handle all of its domestic and international purchasing, sales and related logistics functions of the company. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size or the absence of employees who would perform the non-managerial or non-executive operations of the company. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the petitioner's claimed subordinate staff of six employees is not adequately corroborated in the record. Further, while the petitioner likely has sufficient staff to perform automobile-related services, it has not established that its current staff, even if adequately documented, would be able to

relieve the beneficiary from involvement in day-to-day operational activities related to the purchase, domestic sale, and export sale of automobiles, as well as ancillary administrative functions associated with these responsibilities. Therefore, based on the current record, we are unable to determine whether the claimed executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary will perform non-executive administrative or operational duties associated with the day-to-day operation of the car dealership.

Although the petitioner indicates that the beneficiary will be responsible for implementing expansion plans and perhaps hiring additional workers, 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'r 1978).

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary will be employed in a qualifying executive capacity. Accordingly, the appeal will be dismissed.

B. Foreign Employment in an Executive Capacity

The remaining issue addressed by the director is whether the petitioner established that the beneficiary was employed by the foreign entity in a qualifying executive capacity. Again, the petitioner does not claim that the beneficiary has been employed in a managerial capacity abroad.

1. Facts

In a letter of support dated September 22, 2014, the petitioner explained that the beneficiary has served as the foreign entity's Chief Financial Officer (CFO) since March 2013. The petitioner described his duties as follows:

As Chief Financial Officer of the foreign parent company, [the beneficiary] assisted in formulating the company's future direction and supporting tactical initiatives, monitored and directed the implementation of strategic business plans, developed financial and tax strategies, managed the capital request and budgeting processes, developed performance measures that supported the company's strategic direction, participated in key decisions as a member of the executive management team, maintained in-depth relations with all members of the management team, managed the accounting, human resources, investor relations, legal, tax, and treasury departments, oversaw the financial operations of subsidiary companies and foreign operations, managed any third parties to which functions have been outsourced, oversaw the company's transaction processing systems, implemented operational best practices, oversaw employee benefit plans, with particular emphasis on maximizing a cost-effective benefits package, and supervised acquisition due diligence and negotiate[d] acquisitions.

The petitioner submitted an organizational chart for the foreign entity which showed the beneficiary and the foreign entity's managing director in lateral positions at the highest tier of the organizational

hierarchy. The second tier included a money exchange specialist and an administrative assistant. The next tier included four sales people, and the lowest tier consisted of one customer service employee and a “shared services” employee.

The director found the initial evidence insufficient to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Consequently, the director issued a request for evidence (RFE) on October 16, 2014. In response to the RFE, the petitioner submitted a letter from the foreign entity dated November 12, 2014, which detailed the duties the beneficiary performed abroad as follows:

- 1st Duty – Financial Management of Contracts (19%)
- 2nd Duty – Company Overall Financial Management (17%)
- 3rd Duty – Policy Elaboration and Approval of Exchange Rates (16%)
- 4th Duty – Strategic Decision-Making (14%)
- 5th Duty – Management of Licenses Relating to Governmental Agencies (9%)
- 6th Duty – New Projects and Expansion Department (13%)
- 7th Duty – Analysis of Marketing and Publicity Budgets (5%)
- 8th Duty – Human Resources Budget (7%)

The letter also listed the beneficiary’s direct subordinates with respect to each duty, and provided an expanded description for each area of responsibility listed. The foreign entity explained that the beneficiary supervised the money exchange specialist and administrative assistant, and worked closely with or supervised the foreign entity’s managing director with respect to financial management, strategic decision-making, new projects and expansion, and budget analysis for sales and marketing.

The director denied the petition, concluding, in part, that the petitioner did not establish that the beneficiary has been employed by the foreign entity in a qualifying executive capacity.

On appeal, the petitioner asserts that the director did not properly consider the information provided in response to the RFE and other evidence that clearly establishes the beneficiary’s foreign employment in an executive capacity.

2. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary has been employed by the foreign entity in a qualifying executive capacity.

By statute, eligibility for this classification requires that the duties of a position be “primarily” of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the information provided by the petitioner indicates that the beneficiary may exercise discretion over the day-to-day operations of the foreign entity, the petitioner has not shown that the beneficiary’s actual duties are primarily executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

At the time of filing, the petitioner provided a list of duties that described the beneficiary's position with the foreign company in very generalized terms, noting that he "assisted in formulating the company's future direction and supporting tactical initiatives," "monitored and directed the implementation of strategic business plans," "developed financial and tax strategies," "managed the accounting, human resources, investor relations, legal, tax, and treasury departments," and, "oversaw the financial operations of subsidiary companies and foreign operations." The duties were overly broad and did not provide a sufficient understanding of the specific tasks the beneficiary performed on a day-to-day basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). For example, the petitioner did not provide any further information regarding how the beneficiary formulated the company's future direction, or information regarding budget plans and goals. Further, the foreign entity's organizational chart does not depict the accounting, human resources, investor relations, legal, tax or treasury departments referenced in the beneficiary's initial description of his duties.

In response to the request for evidence, the petitioner provided additional information regarding the beneficiary's foreign duties and an explanation of how the beneficiary's subordinates assisted the beneficiary in each function. The petitioner also provided an organizational chart of the foreign company. However, the record does not contain any documentary evidence corroborating the foreign entity's organizational structure or staffing levels such as resumes, paystubs, or tax statements. 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)).

In addition, although the petitioner states that the beneficiary supervises the foreign entity's majority owner and managing director, the submitted organizational chart depicts the beneficiary and managing director in lateral positions. For this reason, some of the duties attributed to the managing director in his capacity as the beneficiary's "subordinate" are not credible. For example, the petitioner states that the beneficiary is responsible for "company overall financial management" and states that the managing director assists him in this regard by performing tasks such as preparation of monthly reports, duties related to accounts payable, accounts receivable, invoicing, purchasing and payments, and monthly expense accounting. As noted, the petitioner initially stated that the beneficiary manages "accounting, human resources, investor relations, legal, tax and treasury departments," when none of these departments actually exist within the foreign entity. 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). Given these unexplained discrepancies, it is unclear whether the beneficiary is actually relieved from performing non-qualifying duties associated with the areas under his responsibility as CEO.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the

Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. The beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.*

Here, while the record indicates that the beneficiary may share authority with the managing director over company policies and goals, it has not established that he primarily performs executive duties, or that he has staff who relieve him from having to perform day-to-day responsibilities associated with the foreign entity’s routine financial and human resources activities.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary has been employed by the foreign entity in a qualifying executive capacity. For this additional reason, the appeal will be dismissed.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that petitioner has not met that burden.

ORDER: The appeal is dismissed.