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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship
and Immigration
Services

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MAY 04 2009

[Redacted]

FILE: [Redacted]
EAC 08 134 51786

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center denied the nonimmigrant visa petition and 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 classify the beneficiary as an O-1 nonimmigrant as an alien with extraordinary ability in the arts, pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i). The petitioner, a Florida-based sole proprietor, is an art collector and art dealer. He seeks to employ the beneficiary as an artist and painter for a period of three years.

The director denied the petition, finding that the petitioner is not an agent or employer, and therefore lacked standing to file the petition on the beneficiary's behalf.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient explanation as to why he should be considered an "established" agent. Counsel submits a brief and additional evidence in support of the appeal.

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991).

The primary issue in this matter is whether the petitioner qualifies as an agent or employer eligible to file an O-1 petition on behalf of the beneficiary.

An O-1 petition "may only be filed by a United States employer, a United States agent, or a foreign employer through a United States agent." 8 C.F.R. § 214.2(o)(2)(i).

Petitions for O aliens shall be accompanied by "[c]opies of any written contracts between the petitioner and the alien beneficiary, or, if there is no written contract, a summary of the terms of the oral agreement under which the alien will be employed." 8 C.F.R. § 214.2(o)(2)(ii)(B).

The regulation at 8 C.F.R. 214.2(o)(2)(iv)(E) imposes the following requirements on petitions filed by United States agents:

Agents as petitioners. A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf. A United States agent may be: The actual employer of the beneficiary; the representative of both the employer and the beneficiary; or a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by an agent is subject to the following conditions:

- (1) An agent performing the function of an employer must provide the contractual agreement between the agent and the beneficiary which specifies the wage offered and the other terms and conditions of employment of the beneficiary.
- (2) A person or company in business as an agent may file the petition involving multiple employers as the representative of both the employers and the beneficiary if the supporting documentation includes a complete itinerary of the event or events. The itinerary must specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues or locations where the services will be performed. A contract between the employers and the beneficiary is required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.
- (3) A foreign employer who, through a United States agent, files a petition for an O nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the act and 8 CFR part 274a.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner indicated that the beneficiary would be employed on a full-time basis at an annual salary of "\$50,000+" and receive other compensation in the form of "standard benefits." In a letter dated April 4, 2008, counsel for the petitioner stated that the beneficiary is an artist, working in a field of endeavor in which self-employment is customary, and stated that the petitioner appears as her agent.

The petitioner submitted a letter dated April 3, 2008 in which he describes himself as a renowned private art dealer and collector in the Sarasota, Florida community. He states that he personally owns a world-class art collection of 600 to 700 pieces of art, valued at \$2.2 million. He further indicates:

As an art-minded leader in the community, I frequently make my home and art gallery available for non-profit functions, auctions, fundraisers and other cultural events. I have made it my personal goal to assist [the beneficiary] in gaining even more recognition in North America. By all accounts, [the beneficiary] is an emerging artist, whose immense talent remains largely undiscovered by the masses.

I will be promoting and employing [the beneficiary] by hosing showcases and auctions, traveling around the United States with [the beneficiary] and featuring her works in critical reviews, all while providing her the necessary outlet to create more unique and beautiful art.

The petitioner submitted his 2008 Florida Annual Resale Certificate for Sales Tax as evidence that he operates a sole proprietorship. The petitioner submitted several newspaper articles regarding his art collection, which confirm that he is well-known locally or regionally as an art collector and dealer.

Finally, the initial evidence included a tentative event itinerary for the beneficiary extending from May 2008 through April 2010.

On April 24, 2008, the director issued a request for additional evidence (RFE). The director acknowledged the petitioner's claim that he would act as the beneficiary's agent. The director advised the petitioner that he must establish that he is an established agent, that is, an individual or company who has been in the business of working as an agent for a period of time prior to the filing of the petition. The director instructed the petitioner to submit copies of contractual agreements of any artists he has represented as an agent.

The director also provided the petitioner with an excerpt of the regulations governing agents at 8 C.F.R. § 214.2(o)(2)(iv)(E), and instructed the petitioner to "establish his role as agent in these proceedings." The director stated that if the petitioner, as agent, will act as the beneficiary's employer, he must submit a contractual agreement with the beneficiary which meets the requirements set forth at 8 C.F.R. § 214.2(o)(2)(iv)(E)(I).

The director further stated:

It appears that the itinerary submitted largely entails promoting the artists work and allotting time for her to complete more pieces. The O-1 classification may not be granted to an alien to enter the United States to freelance on the open market [See Federal Register 41818-41842 (August 15, 1994)].

The itinerary submitted does not provide adequate details. Submit a complete itinerary of engagements which shows the specific dates of each engagement, the name of the actual employer and the name and address of the facility where the services will be performed. Submit evidence to establish that the beneficiary has entered into a contractual agreement with an employer or agreements with several employers.

In response to the RFE, counsel for the petitioner submitted a letter dated May 7, 2008. Counsel emphasized that the regulations do not reveal to what degree an agent has to have been in the business of working as an agent, prior to filing a petition in order to be considered "established." Counsel stated that the petitioner and his company have been active in the Sarasota art community for nearly 30 years, and noted that the petitioner is a well-renowned private art dealer and collector. Counsel emphasized that the petitioner is a philanthropic leader in the community and further stated:

[The petitioner] has graciously decided, - based on [the beneficiary's talent and promise as a great emerging artist, - that he would like to assist [the beneficiary] in gaining even more recognition in the North American art environment.

To this end, [the petitioner] will be using his reputation, and his company, to promote [the beneficiary] in whatever ways he can, to further and grow here career as an artist.

We hope that you accept that [the petitioner] and his business are well-established in the community for purpose of this section.

Counsel further stated that the petitioner, in his role as the beneficiary's agent, would include the following:

1. acting as her U.S. representative for the purpose of accepting Service of Process,
2. acting as her manager/agent for purposes of coordinating and scheduling events throughout the United States, which [the beneficiary] will attend,
3. acting as her agent for purposes of displaying her art in various galleries throughout the United States and assisting [the beneficiary] in obtaining favorable consignment agreements.
4. acting in the capacity of and performing the function of a U.S. employer for purposes of generating more artwork.

Counsel asserted that the beneficiary in this matter employs herself outside the United States and qualifies as a "foreign employer" pursuant to 8 C.F.R. § 214.2(o)(2)(i).

The petitioner resubmitted the above-referenced letter dated April 3, 2008. The petitioner also submitted a letter from the beneficiary dated February 28, 2008, in which she states that she is a self-employed artist operating in Latvia as a sole proprietorship. She indicated that she has appointed the petitioner to serve as her agent for filing petitions under the terms of the U.S. Immigration and Nationality Act. The petitioner also submits a letter dated February 28, 2008, in which he indicates that he will accept the service of process under section 274A of the Act.

In addition the petitioner submitted an agency agreement between the petitioner and the beneficiary dated March 4, 2008. The agreement provides the following "division of duties":

Artist commits to provide original art in good condition to fulfill the requirements of Agent's efforts in direct sales, commissions or gallery requests. Agent agrees to use his experience, credentials and contacts in the field of Objects of Art for the promotion and sale of the Artist works.

Agent and Artist agree that one of the primary objectives is to promote the Artist through shows, exhibits, publications and as a result gradually increase price schedule through broader exposure and appreciation of the Artist's paintings.

Agent agrees to act as artist's U.S. representative for the purpose of accepting Service of Process.

The agreement indicates that the petitioner, as agent, will be compensated at a rate of a 50% commission from any art sales directly attributable to his activities on the beneficiary's behalf.

Finally, the petitioner submitted an expanded itinerary which extends from May 31, 2008 until April 2010. The petitioner provided additional information regarding the events and gallery shows in which the beneficiary would participate.

The director denied the petition on May 23, 2008, concluding that the petitioner does not qualify as an agent. In denying the petition, the director observed that the petitioner failed to demonstrate that he had any prior experience as an agent, and therefore did not establish that he is authorized to file a nonimmigrant petition on the beneficiary's behalf.

On appeal, counsel for the petitioner asserts that the director's determination was unreasonable in light of the petitioner's standing and experience in the field of the arts. Counsel once again emphasizes that the petitioner has been active in the Sarasota art community for nearly 30 years, and is "extremely well-connected in artist circles." Counsel indicates that the beneficiary intends to transition from the high-end decorative art market to the collectible art market, and is returning to the use of an agent in order "to manage this transition without reduction of her productive hours." Counsel notes that the beneficiary has not utilized an agent as a marketing technique "since her early postgraduate entry into the North American market."

The petitioner submits a prospectus and notes that the information was not previously submitted due to the petitioner's "personal sensitivity to disclosing his proprietary, unique marketing technique." The prospectus notes the petitioner's educational background, art business experience, long term clients, recent sales of significance, current trends in art, and his intention to take advantage of such trends by joining with the beneficiary, whose contemporary figurative style is in demand. The petitioner also submits a business plan developed by the beneficiary, the petitioner and the "primary dealer," [REDACTED] of R&R Bond Gallery in Sarasota, Florida. The business plan further discusses the beneficiary's intended transition from the decorative arts to the collectible arts, and indicates that the petitioner is "uniquely qualified as agent" due to convenient local support, a large personal residence suitable for visitation of collectors and/or gallery principals, and established business contacts and reputation.

Upon review, the AAO concurs with the director's determination. The regulations do not indicate that simply any United States individual or corporation may declare itself to be an "agent" and thereby claim standing to file O-1 petitions. The regulation explicitly describes eligible agents as those acting as the beneficiary's employer, the representative of both the employer and the beneficiary, or a foreign employer's authorized agent. 8 C.F.R. § 214.2(o)(2)(iv)(E). *See also* 8 C.F.R. § 214.2(o)(2)(iv)(B) (referencing "established agents").

There is no evidence in the record that the petitioner in this matter has previously acted as an agent for any artist. The AAO does not question the petitioner's dedication to the arts, or his standing in the Sarasota artistic community as a collector and dealer. However being "established" in the arts community is not equivalent to being "established" as an agent.

Moreover, the petitioner has not been consistent in its explanation of his role as the beneficiary's agent. The initial evidence implied that the parties would have an "agent as employer" relationship similar to what is described at 8 C.F.R. § 214.2(o)(2)(iv)(E)(1). The petitioner indicated on Form I-129 that the beneficiary would receive a specific annual salary and benefits, and the petitioner referred to its "employment of the beneficiary" in the letter submitted in support of the petition. Furthermore, in response to the RFE, counsel indicated that the petitioner would be "acting in the capacity of and performing the function of a U.S. employer for purposes of generating more artwork." However, none of these terms of "employment" were indicated in the agency agreement that was subsequently submitted in response to the RFE, although the agency agreement ostensibly pre-dates the filing of the petition.

Rather, in response to the RFE, it appeared that the petitioner was attempting to establish that his relationship with the beneficiary is more akin to an agent of a foreign employer, as described at 8 C.F.R. § 214.2(o)(2)(iv)(E)(3), with the beneficiary herself being the "foreign employer." 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). Due to the discrepancies, the record does not contain sufficient evidence to support a finding that the petitioner, even if he were an established agent, would act as an agent under any of the criteria outlined at 8 C.F.R. § 214.2(o)(2)(iv)(E).

Finally, the AAO notes that the petitioner did not submit sufficient evidence to establish that he had actually arranged any of the gallery shows or other events listed on the beneficiary's proposed itinerary. The AAO notes that the record shows that the beneficiary has an existing relationship with most or all of the parties mentioned in the itinerary, and counsel acknowledges on appeal that the beneficiary has not historically utilized an agent to market and promote her work. Absent evidence to the contrary, it is reasonable to assume that the beneficiary herself made most or all of the arrangements for the events listed on her itinerary. For example, the record contains a letter dated March 22, 2008 from [REDACTED] Director of the Whitt/Krauss gallery in San Diego, California, inviting the beneficiary to attend its "Red Carpet Gala" on November 14 and 15, 2008. There is no documentary evidence that the petitioner had a role in securing any commissions, gallery shows or other appearances listed on the provided itinerary.

The petitioner has not submitted evidence on appeal to overcome the director's finding that the petitioner does not qualify as an established agent eligible to file a petition on the beneficiary's behalf pursuant to 8 C.F.R. 214.2(o)(2)(iv)(E). Accordingly, the appeal will be dismissed.

Beyond the decision of the director, upon review of the record, the AAO finds insufficient evidence to establish that the beneficiary qualifies as an alien of extraordinary ability in the arts.

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) provides, in pertinent part, the following definition:

Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading or well-known in the field of arts.

The regulation at 8 C.F.R. § 214.2(o)(3)(iv) states, in pertinent part:

Evidentiary criteria for an O-1 alien of extraordinary ability in the arts. To qualify as an alien of extraordinary ability in the field of arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

- (A) Evidence that the alien has been nominated for, or the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or
- (B) At least three of the following forms of documentation:
 - (1) Evidence that the alien has performed, and will perform, services as a lead or

starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;

- (2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;
 - (3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;
 - (4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;
 - (5) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or
 - (6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or
- (C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

In a letter dated April 4, 2008, counsel stated that the petitioner was providing evidence to meet the criteria at 8 C.F.R. §§ 214.2(o)(3)(iv)(2), (4), (5) and (6). The AAO will limit its discussion to these criteria.

To meet the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(2), the petitioner must submit evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications. The petitioner stated that the beneficiary could meet this criterion based upon four scholarships and awards she received while she was an art student between 1995 and 1997, and based on her honorary membership in the Artists Union of Latvia since 1999.

Counsel did not explain how such scholarships and awards amount to "critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines or other publications." The evidence submitted does include one published critical review of the beneficiary's work; however, the review appeared in the *Longboat Observer*, which is not a major newspaper. The petitioner has not established that the beneficiary meets this criterion.

In order to meet the fourth criterion, at 8 C.F.R. § 214.2(o)(3)(iv)(4), the petitioner must submit evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications.

To satisfy this criterion, the petitioner indicated that the beneficiary has had five solo exhibitions, in 1994, 1998, 1999, 2005 and 2006, and provided a list of other "selected exhibitions" of the beneficiary's work between 1994 and 2006. The list indicates that the beneficiary's work has been exhibited in Latvia, Denmark, Canada and the United States. While it is evident that the beneficiary is a successful artist able to make a living from the sale of her works, it is unclear how she meets the standard of "distinction" simply by having her work exhibited in galleries, even if such galleries are "highly selective" as claimed by the petitioner. The regulation requires evidence of major commercially or critically acclaimed successes of occupational achievement *as reported in trade journals, major newspapers or other publications*. The petitioner did not submit evidence to meet this criterion.

The fifth criterion, at 8 C.F.R. § 214.2(o)(3)(iv)(5), requires the petitioner to submit evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements.

The beneficiary has solicited a number of reference letters from persons familiar with her work. The majority of these letters discuss the beneficiary's talent and potential for achievement and success at some future time. For example, [REDACTED], a collector based in Philadelphia and Copenhagen, describes the beneficiary as an "emerging raw talent." [REDACTED] of the Art Academy of Latvia indicates that the beneficiary is recognized as "a greatly promising painter." Artist [REDACTED] indicates that the beneficiary "is becoming increasingly well known," and "will go far with her artistic career." A gallery owner, [REDACTED], expressed his opinion that the beneficiary's skills "are certain to establish her as one of the leading figurative artists."

Similarly, [REDACTED], chairman of the City of Sarasota Public Art Committee, states that the beneficiary "has been developing into a figurative decorative artist with a singular characteristic style," and has a growing reputation. Another gallery owner who has displayed the beneficiary's work, [REDACTED], indicates that the beneficiary has a "truly unique style for her young age," and states that she feels the beneficiary "will go far in her art career." [REDACTED] and [REDACTED], who are associated with R&R Bond Galleries, indicate that the beneficiary is a "burgeoning talent." [REDACTED], managing director of International Graphics Walmsley GmbH opines that the beneficiary "is an accomplished artist of good merit – surely a

potential great in the years to come." The petitioner acknowledges that "by all accounts, [the beneficiary] is an emerging artist, whose immense talent remains largely undiscovered by the masses."

The witness letters do not demonstrate that the beneficiary has achieved the level of prominence, distinction and sustained acclaim required of aliens with extraordinary ability in the arts. Rather, upon review of the letters, it is reasonable to conclude that the beneficiary is a relatively new artist with a growing reputation and the potential to become a prominent artist. However, to qualify for O-1 status, the beneficiary must already be at a level where she is considered "renowned, leading or well-known in the field of arts." The petitioner has not established that the beneficiary meets this criterion.

Finally, the petitioner indicates that the beneficiary satisfies the criterion at 8 C.F.R. § 214.2(o)(2)(iv)(E)(6), which requires submission of evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence. In this regard, the petitioner submits a sample pricelist for the beneficiary's art, a print out from the U.S. Department of Labor's web site providing the prevailing wage for Artists/Painters in Sarasota, Florida, and photocopies of checks payable to the beneficiary for art pieces she has recently sold. The petitioner indicates that the beneficiary sold art in the amount of over \$12,000 during the first quarter of 2008.

The beneficiary's pricelist includes ten pieces with wholesale prices between \$500 and \$4,600 and adjusted retail prices of \$1,500 to \$13,800. The information from the Department of Labor indicates that fine artists, painters and illustrators in Sarasota, Florida earn between \$8.00 and \$11.00 an hour. While the beneficiary appears to be capable of earning considerably more than the prevailing wage, it is also noted that she does not have an "employer" in the traditional sense and is not being paid an hourly or annual wage, which lessens the usefulness of prevailing wage data as a point of comparison. The petitioner has provided no historical information regarding the beneficiary's past earnings, prior to 2008. The AAO finds insufficient evidence to establish that the beneficiary has commanded or will command a high salary or other remuneration in relation to others in the field.

Overall, the evidence relating to the beneficiary's recognition in the arts does not establish that the beneficiary is prominent, leading or renowned in her field of endeavor, or that she has earned sustained national or international acclaim. The petitioner submitted no evidence that the beneficiary has received a major, internationally recognized award and the documentation submitted does not meet three of the eight other evidentiary criteria specified in the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B). Consequently, the beneficiary is not eligible for nonimmigrant classification under section 101(a)(15)(O) of the Act and the petition must be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion

with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.