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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[REDACTED]

File: WAC 01 230 51078 Office: CALIFORNIA SERVICE CENTER

Date: MAY 07 2003

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[REDACTED]

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its president and chief executive officer (CEO). The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition on the grounds that: (1) a qualifying relationship did not exist between the petitioner and the Mexican entity; (2) the beneficiary was not employed in an executive or managerial capacity for at least one year in the three years preceding his entry into the United States in a nonimmigrant status; and (3) the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief. Counsel states, in part, that the director abused his discretion in denying the petition.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

- (1) Priority Workers. - - Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. - - An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the

United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is affiliated with [REDACTED] S.A. de C.V. of Mexico; (2) markets sportswear that is manufactured by its Mexican affiliate; and (3) employs the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary on a permanent basis at a salary of \$120,000 per year.

The first issue to be discussed is whether the petitioner and the overseas entity have a qualifying relationship.

To establish eligibility for this immigrant visa classification, a petitioner must establish that is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the beneficiary was employed overseas. 8 C.F.R. § 204.5(j)(3)(i)(C). Pursuant to 8 C.F.R. § 204.5(j)(2), affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) 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; * * *

In the initial petition filing, the petitioner stated that it and the Mexican entity were affiliates because the same individual, [REDACTED], owned a majority interest (51 percent) in each entity, while other parties owned the remaining shares in differing percentages of ownership. The director determined that the evidence was insufficient to establish the existence of a qualifying relationship. Therefore, on November 13, 2001, he requested evidence to include the following:

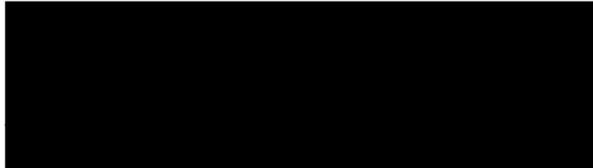
- Proof of Stock Purchase: Submit evidence to show that the foreign parent company has, in fact, paid for the U.S. entity. The evidence should include copies of the **original wire transfers** from the parent company. Also include, cancelled checks, deposit receipts, etc., detailing monetary amounts for the stock purchase. Provide the account holder names and affiliation to the foreign entity for all persons making purchases and the bank accounts that

¹ The Bureau notes that [REDACTED] is the beneficiary of this immigrant petition. His name also appears in the record as [REDACTED] and [REDACTED]

were used. The originator(s) of the monies deposited or wired must be clearly shown and verifiable by name with full address and phone/fax number. For all funds not originating with the foreign company, explain the source and reason for receiving such funds and provide the names of all account holders depositing these funds and their affiliation to the foreign or U.S. company. (Emphasis in original.)

- Stock Certificates/Stock Ledger: Submit copies of all of the U.S. company's stock certificates issued to the present date clearly indicating the name of each shareholder. Also, resubmit copies [of] the company's stock ledger showing all stock certificates issued to the present date including total shares of stock sold, names of shareholders and purchase price (it appears as if the copy was cut off on the right side).
- Detailed List of Owners: Submit a detailed list of the owners of the U.S. company and what percentages they own. List names, corporate and specific government affiliation and percentages of ownership.

In response, the petitioner submitted copies of bank receipts for deposits made to its account in 1996, copies of its stock certificates, a copy of its stock ledger, and a list of its owners. According to the petitioner, the ownership of the Mexican and U.S. entities were as follows:

Petitioner		51 percent
		49 percent
Mexican Entity		51 percent
		40 percent
		3 percent
		3 percent
		3 percent

The director denied the petition, in part, on the ground that a qualifying relationship does not exist between the two entities because the evidence failed to establish that the petitioner and the Mexican entity were owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. In addition, the director noted that copies of the petitioner's federal income tax returns listed  as owning 100 percent of the petitioner's shares of stock, not 51 percent as claimed by the petitioner. The director also stated that copies of the bank deposit slips were illegible, and they did not establish that monies came from the alleged owners to buy the shares of stock.

On appeal, counsel states that the petitioner and the Mexican entity are affiliates pursuant to section (A) of the definition of affiliate in 8 C.F.R. § 204.5(j)(2) because both the petitioner and the overseas entity are owned and controlled by one individual, [REDACTED]. Counsel states that section (B) of the definition of affiliate does not apply when one person is a majority owner. Counsel also states that he recently learned that [REDACTED] now owns 100 percent of the petitioner's shares of stock. Counsel submits copies of the petitioner's stock ledger, its stock certificates, and an affidavit from [REDACTED] regarding his ownership of the company.

Counsel correctly asserts on appeal that if one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. Here, however, no qualifying relationship exists between the two entities because documentary evidence regarding [REDACTED] alleged ownership and control of the two companies is not credible.

Initially, the petitioner submitted a copy of its corporate stock ledger and copies of stock certificate numbers one through four. According to the ledger, Mr. [REDACTED] was issued stock certificate numbers one and three; [REDACTED] was issued stock certificate number two; and [REDACTED] was issued stock certificate number four. According to this same ledger, stock certificate numbers one and two were subsequently cancelled; however, neither copy of stock certificate number one or certificate number three was cancelled or revoked. On appeal, the petitioner submits a copy of another stock ledger, which indicates that stock certificate numbers two and four were cancelled and revoked. The copies of stock certificate numbers two and four showed that each certificate was revoked. Additionally, Mr. [REDACTED] submits an affidavit in which he explains the history of the company's ownership.

Evidence in the record does not establish Mr. [REDACTED] ownership of a majority interest in the petitioner and his control of the same. The two stock ledgers and the two sets of stock certificates contain discrepancies regarding which stock certificates were allegedly cancelled or revoked. The petitioner has not presented any evidence, including an affidavit from its corporate attorney, to explain the discrepancies. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, neither counsel nor the petitioner addresses the director's concerns regarding the source of the monies used to purchase the petitioner's shares of stock.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As the record is presently constituted, there is no credible evidence that Mr. [REDACTED] owns and controls the petitioner. Therefore, a qualifying relationship with the overseas entity does not exist, and the director's decision regarding this issue shall not be disturbed.

The second issue to be discussed is whether the beneficiary was employed in an executive or managerial capacity for at least one year in the three years immediately preceding his entry into the United States as a nonimmigrant.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

At the time of filing the petition with the California Service Center on April 26, 2001, the petitioner indicated that the beneficiary had been employed by the overseas entity as the general director and president of the board of directors. On November 13, 2001, the director requested additional evidence from the petitioner, to include:

- Foreign Company's Organizational Chart: Submit a copy of the foreign company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current name of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages . . . and immigration status . . . for all employees under the beneficiary's supervision. (Emphasis in original.)
- Duties Abroad: Submit a more detailed description of the beneficiary's duties abroad. Be specific. Indicate exactly who the beneficiary directs including their job title[s] and position description[s]. Also, indicate percentage of time the beneficiary spends in each of the listed duties.

In response, the petitioner submitted an organizational chart, which showed the beneficiary's name over three companies. The chart did not contain the Mexican entity's managerial hierarchy or staffing levels. Additionally, the petitioner submitted a 1996 letter from the Mexican entity, which stated that the beneficiary held the positions of general manager and president of the board of

directors since 1986. This letter, however, did not describe the beneficiary's job duties in these positions.

The director denied the petition, in part, on the basis that the Mexican entity did not employ the beneficiary in an executive or managerial capacity for the requisite period of time because the employment verification letter did not contain the name of the Mexican entity. On appeal, counsel states that the director failed to understand that the name of the company on the employment verification letter was simply an English translation of the overseas entity's Spanish name. Counsel states that this letter has been submitted to the Bureau each time the beneficiary has applied to extend his L-1A nonimmigrant stay in the United States and it has always been sufficient evidence. Counsel asserts that the letter "contains more than adequate detail as to the executive and managerial position held abroad."

Counsel's explanation regarding the name of the Mexican entity on the letterhead is acceptable. However, the letter is inadequate to establish that the beneficiary was employed in a managerial or executive capacity by the Mexican entity. Although requested by the director, the petitioner failed to present an organizational chart of the Mexican entity's managerial hierarchy and staffing levels, as well as a detailed description of the beneficiary's job responsibilities. The letter that was submitted does not list one job duty that the beneficiary performed as the general director. The beneficiary's level of authority within the organizational hierarchy is unclear, and there is no evidence that he actually directed or managed a department or subdivision. Without more evidence, the Bureau cannot determine whether the beneficiary primarily acted as the general director or performed the tasks that were necessary for the overseas entity to produce its products or provide its services. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988).

Counsel states on appeal that the letter from the Mexican entity has been sufficient evidence of the beneficiary's employment in a managerial or executive capacity, as this same letter was used to obtain the beneficiary's initial L-1A nonimmigrant status and to subsequently extend his stay.

It is important to emphasize that each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the Bureau is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). The petitioner must establish that the beneficiary qualifies for this immigrant visa regardless of any nonimmigrant petitions that the Bureau may have approved on the beneficiary's behalf. Based upon the evidence before the Bureau at the present time, the petitioner has not met its burden of establishing that the Mexican entity employed the beneficiary in a managerial or executive position

for the requisite period of time. Therefore, the director's decision on this issue will also not be disturbed.

The third and final issue to be discussed is whether the proffered position of president and CEO is in an executive or managerial capacity.

At the time of filing the petition, the petitioner described the beneficiary's responsibilities as:

[The beneficiary] will be the primary executive responsible for the overall management of the California organization. Will be responsible for establishing and implementing corporate goals and policies. Will exercise wide latitude in discretionary decision making. The beneficiary's duties will be primarily those of an executive nature. Will direct the management of the U.S. company's activities through other executive and managerial, professional and administrative staff, and those independent contractors retained. Will be responsible for setting in-house policies and goals, as the petitioner's most senior and key executive. In addition, will be the primary executive responsible for negotiating contracts for the development of the petitioner's services with U.S. and Mexican clientele, consisting of providing executive management services to the U.S. company's group of affiliated companies both in the United States and Mexico.

The director did not find the petitioner's description of the proffered position sufficient to determine whether the beneficiary would be employed in a managerial or executive capacity. Therefore, on November 13, 2001, the director requested additional evidence from the petitioner, to include:

- Executive Capacity: means an assignment within an organization in which the employee primarily: A) Directs the management of the organization or a major component or function of the organization; B) Establishes the goals and policies of the organization, component, or function; C) Exercises wide latitude in discretionary decision-making; and D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization. Provide a list of the specific goals and policies the beneficiary has established over the last six (6) months. Provide a list of the specific discretionary decisions that the beneficiary has exercised over the last six (6) months. Provide evidence that the higher level executives, the board of directors, or stockholders of the organization require only general supervision of the beneficiary. Finally, provide a specific

day-to-day description of the duties the beneficiary has performed over the last six (6) months.

- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current name of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages . . . and immigration status . . . for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission. (Emphasis in original.)
- Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees at the beneficiary's work site for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees.
- Payroll Summary: Submit copies of the U.S. company's payroll summary, W-2's and W-3's evidencing wages paid to employees at the beneficiary's worksite.

Regarding the beneficiary's proposed job responsibilities, counsel reiterated the petitioner's initial description of the proffered position. Counsel also indicated that the petitioner was submitting six letters to certify that the beneficiary performs executive duties. The petitioner also submitted the same organizational chart that it used to show that the beneficiary was employed in a managerial or executive position with the Mexican entity. To reiterate, the chart showed the beneficiary's name over three companies.

Regarding the petitioner's DE-6 forms and payroll records, counsel stated that the petitioner was submitting evidence from My Viet Sewing and Yin's Fashion Sewing Contractor, two companies that contract with the petitioner. According to counsel, between the two companies, the petitioner "supervises over 40 employees." Additionally, the petitioner submitted an internal report to reflect payments to independent contractors, copies of Form 1099 (Miscellaneous Income Statement), and copies of agreements between the petitioner and salespersons. Counsel states that the petitioner "out-sources" the majority of its labor related

activities such as transportation, shipping, delivery, sorting, sales, and professional services.

The director denied the petition, in part, on the basis that the proffered position was not in an executive or managerial capacity because the beneficiary does not supervise professional employees, and the petitioner failed to submit evidence that the beneficiary had managerial control over any of the contracted workers.

On appeal, counsel states that the petitioner has a subordinate staff involved in the operational aspects of the company. Counsel claims that in 2001, the petitioner paid \$147,216 in fees and commissions to persons performing labor on behalf of the company. Counsel also states since the petitioner's inception in 1996, the beneficiary has operated the company without supervision, reports only to the board of directors, and has a salary and benefits commensurate with a person employed in an executive capacity. Counsel refers to several unpublished decisions of the Administrative Appeals Office to support his assertion that the beneficiary can be deemed a manager or executive despite a company's size, its number of employees, or the industry in which it is involved. Counsel again reiterates his claim that the proffered position was already found to be in an executive or managerial capacity at the time the L-1A nonimmigrant petition was approved on the beneficiary's behalf.

The petitioner also submits additional evidence on appeal to include: three 1099 forms for compensation paid to commissioned sales persons; employment records for two individuals who were hired in 2002; and letters and agreements between the petitioner and other companies regarding business transactions. Counsel states that the evidence shows that the beneficiary maintains managerial control over outside companies that perform services for the petitioner.

Counsel correctly asserts on appeal that the size of the petitioner 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 Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, the duties of the proffered position must be the critical factor. See Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B).

The beneficiary's job description is a reiteration of the definition of executive capacity. It does list any specific job duties, or provide information regarding how and at what frequency the job responsibilities are performed. 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). Without more information about the beneficiary's daily activities, the job description does not establish that the position offered to the beneficiary involves primarily managerial or executive duties.

The six letters from firms with which the petitioner does business also do not establish the beneficiary's employment in an executive or managerial capacity. Each writer states that he or she transacts business with the beneficiary; however, none of the writers sheds any light on the beneficiary's actual job responsibilities. Thus, the assertions of each writer carry little weight in determining the beneficiary's true role with the United States' company. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Similarly, the report allegedly showing the list of the petitioner's independent contractors is of little value. It does not contain the name of the contractor, the services it provides, and the frequency with which it provides the services to the petitioner.

Additionally, the record contains conflicting information regarding the petitioner's organizational hierarchy and staffing levels. According to the petitioner, the beneficiary "will direct the management of the U.S. company's activities through other executive and managerial, professional and administrative staff, and those independent contractors retained." In a January 28, 2002 letter from Enciso & Associates, the writer claims that it receives instructions either from the beneficiary "and/or his management staff."

The petitioner, however, does not identify the executive, managerial, professional or administrative staff member(s) through whom the beneficiary would direct the petitioner's operations, or the individuals whom Enciso & Associates considers to be the beneficiary's "management staff." Although the petitioner submits evidence on appeal that it hired two individuals in 2002, Bureau regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is in an executive or managerial capacity. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). At the time of filing the petition, the beneficiary was the only employee on the company payroll. The petitioner's failure to support its assertion or Enciso & Associate's assertion regarding alleged executive, managerial, professional, or administrative employees, calls into question the reliability and sufficiency of the beneficiary's overall job description, and whether it realistically depicts his proposed job responsibilities within the United States entity. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner was provided an opportunity to outline its organizational hierarchy and describe in detail how it produces its products or provides its services. Simply stating that the petitioner contracts with individuals and other companies to assist it to produce products and/or provide its services is insufficient. *Matter of Treasure Craft of California, supra.*

Counsel refers to several unpublished decisions of the Administrative Appeals Office regarding the L-1A nonimmigrant classification to support his claims that the beneficiary would be employed in an executive or managerial capacity. Although 8 C.F.R. § 103.3(c) provides that precedent decisions of the Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services (Bureau) are binding on all Bureau employees in the administration of the Act, unpublished decisions are not similarly binding. Similarly, the prior approval of an L-1A nonimmigrant petition on the beneficiary's behalf does not mandate the approval of an immigrant petition for the same position. See 8 C.F.R. § 103.2(b)(16)(ii). The Administrative Appeals Office is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Based upon the above discussion, the petitioner has not demonstrated that the position offered to the beneficiary is in an executive or managerial capacity. Therefore, the director's decision to deny the petition on this basis shall not be disturbed.

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. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.