

U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. St.
4th Floor
Washington, D.C. 20536

Identifying data deleted to
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DA

FILE: SRC 98 125 53436

Office: TEXAS SERVICE CENTER

Date:

JAN 07 2004

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).

IN BEHALF OF PETITIONER:

PUBLIC COPY

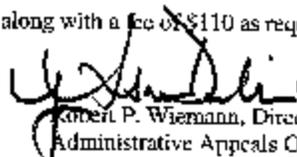
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion to reopen or reconsider. The motion shall be dismissed.

The petitioner is a company that is engaged in the import and export of leather goods and garments. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its director/president. On Form I-129, the petitioner claimed it has a net annual income of \$40,000, three employees, and pays a \$30,000 salary per year to the beneficiary.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization.

Further, if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation at 8 C.F.R. § 214.2(l)(14)(i)&(ii) requires that:

(i) *Individual Petition.* The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L). Except for those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition may be filed only if the validity of the original petition has not expired.

(ii) *New offices.* A visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

On March 19, 1998, the petitioner submitted Form I-129 to extend the beneficiary's L-1A classification. The petitioner submitted documentation with the form and described the beneficiary's duties.

On April 29, 1998, the director requested further information including a detailed job description of the beneficiary's duties in the United States, percentages of time spent on those duties, subordinate employees' titles and a detailed job description, invoices and bills for the sale of leather goods, and evidence that the foreign entity was doing business.

In response to the director's request, the petitioner submitted information concerning the beneficiary's duties. However, it failed to submit requested information listing the job titles and duties of the employees that the beneficiary supervises.

On August 7, 1998, in his notice of decision, the director determined that the petitioner had submitted insufficient evidence to establish that the beneficiary's duties were primarily that of an executive or manager pursuant to 8 C.F.R. 214.2(1)(14)(ii) or that the beneficiary would be employed temporarily pursuant to 101(a)(15)(L) of the Immigration and Nationality Act. The director found that the

petitioner failed to submit the requested evidence listing the job titles and duties of the beneficiary's subordinate employees. The director also found that one of the employees was not listed on the petitioner's quarterly report.

On appeal, counsel, on behalf of the petitioner, asserted that the beneficiary has been employed in a primarily managerial or executive capacity. The petitioner did not refute the director's assertion that the petitioner did not submit sufficient evidence to establish that the beneficiary would be employed by the petitioning entity temporarily. The petitioner also submitted additional evidence on appeal that the director had already requested. The petitioner claimed that the U.S. entity had six employees rather than three and included a description of the employees' duties.

On November 17, 1999, the AAO dismissed the appeal reasoning that the evidence submitted by the petitioner had not overcome the objections of the director. In his decision, the Associate Commissioner determined that the petitioner had submitted sufficient evidence to establish that the beneficiary's employment would be temporary in nature. However, the Associate Commissioner also determined that the petitioner did not submit sufficient evidence to establish that the beneficiary was primarily employed in a managerial or executive capacity or that a qualifying relationship existed between the petitioner and the claimed foreign parent company. The Associate Commissioner found that the petitioner declared three employees on Form I-129, at the time of filing for the beneficiary's extension, and did not provide a description of the employees' duties that the director had requested. The Associate Commissioner also found that the petitioner, on appeal, claimed six employees rather than three employees previously indicated and submitted descriptions of their duties. However, the Associate Commissioner would not consider the additional evidence. The petitioner had been given notice and a reasonable opportunity to submit the requested evidence. Therefore, the appeal was adjudicated based on the record of proceedings before the Associate Commissioner. Specifically, the Associate Commissioner cited *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988) to support his decision. The Associate Commissioner also found that, beyond the decision of the director, there was no documentation to establish that money was transferred from the foreign entity to the U.S. entity, in exchange for the U.S. entity's stock.

On motion, counsel asserts that the beneficiary has been and will be employed primarily in a managerial or executive capacity. Specifically, counsel asserts that the Associate Commissioner failed to consider the additional evidence requested by the director. Counsel contends that the precedent decision of *Matter of Soriano, supra* was inappropriately applied because "the rules are different and more like rules of court concerning the admissibility of evidence." Counsel asserts that *Soriano* held that, although additional evidence could not be considered on appeal, the fact that some evidence had already been submitted resulted in an error in denying the case on the grounds that no evidence had been submitted. The case, including the additional evidence, was remanded for further consideration. Moreover, counsel contends that Form I-120B, Item 4, "invit[es] the submission of additional evidence with the appeal because Form I-120B states that the petitioner may "submit a brief, statement, and/or evidence with this form." Counsel questions whether the AAO is stating not to send any additional evidence with the appeal and that it will not be "considered unless it relates to something that the director put in his denial without first giving notice to the petitioner." In addition, counsel asserts that there is a qualifying relationship between the petitioner and the foreign entity. Counsel asserts that the Associate Commissioner was incorrect because the parent owns 80,000 shares of the authorized 100,000 shares of the U.S. entity, thereby, owning 100% of the U.S. entity. Counsel claims that there were only 80,000 shares outstanding and the share register indicates that the foreign parent owns the stock. For these reasons, the petitioner requests that the AAO reopen and reconsider the case.

In reference to a motion to reopen or reconsider, the regulation at 8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

(i) The requested evidence was not material to the issue of eligibility;

(ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or

(3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Moreover, unless Citizenship and Immigration Services (CIS) directs otherwise, the filing of a motion to reopen or reconsider or of a subsequent application or petition does not stay the execution of any decision in a case or extend a previously set departure date. See 8 C.F.R. § 103.5(a)(2)(iv).

In order to succeed on a motion to reopen, the petitioner must state new facts to be proved in the reopened proceeding, supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The petitioner indicated that it is submitting additional evidence that was not considered by the Associate Commissioner on appeal. However, the additional evidence must be considered as new facts to support a motion to reopen the case. Based on the plain meaning of the term "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding. The director requested additional evidence listing the job titles and duties of the beneficiary's three subordinate employees. However, the petitioner failed to submit this additional evidence and on appeal submitted a job description of six employees. A review of this evidence, that the petitioner claims should have been considered when submitted on appeal, reveals no facts that could be considered new. See 8 C.F.R. § 3.2(c)(1). The six employees' job descriptions could have been provided to the director prior to adjudicating the petitioner's visa petition on August 7, 1998 as indicated by the quarterly report ending June 30, 1998

which lists the six employees. See C.F.R. § 103.5(a)(2)(ii). Here, the petitioner had notice and a reasonable opportunity from April 29, 1998 until August 7, 1998 to submit the requested additional evidence. Therefore, after careful review, the AAO concludes that pursuant to 8 C.F.R. § 103.5(a)(2), the petitioner has not presented any new facts to warrant a motion to reopen the case.

In addition, a motion to reconsider must be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy and must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. See C.F.R. § 103.5(a)(3). The petitioner claimed that the Associate Commissioner inappropriately applied *Matter of Soriano*, supra. However, the petitioner has provided no precedent decision to establish that the Associate Commissioner's decision was based on an incorrect application of the law. See *id.* Therefore, the AAO concludes that, pursuant to 8 C.F.R. § 103.5(a)(3), the petitioner has not presented any pertinent precedent decisions to establish that the Associate Commissioner's decision was based on an incorrect application of law to warrant a motion to reconsider the case.

The AAO notes that the petitioner asserted that the Associate Commissioner inappropriately applied *Matter of Soriano*, *id.* to the case at bar because "the rules are different and more like rules of court concerning the admissibility of evidence." Although the rules of evidence are not as stringent in administrative proceedings, the Associate Commissioner looks to precedent case law to support his decision. *Matter of Soriano* is a binding case that is considered a pertinent precedent decision establishing the premise that when a petitioner has notice of the required evidence and is given a reasonable opportunity to provide it for the record, evidence submitted on appeal will not be considered for any purpose before the visa petition is adjudicated. See *Matter of Soriano*, *id.* However, in such a case if the petitioner desires further consideration, he must file a new visa petition. See *id.* Therefore, since the decision in this case is binding, the Associate Commissioner did not err in applying *Matter of Soriano* to the case at bar. The petitioner was given notice and a reasonable opportunity to respond to the director's request for additional evidence from April 29, 1998 until

August 7, 1998. Therefore, the Associate Commissioner was not required to consider the additional evidence on appeal.

Moreover, counsel contends that Form I-120B, Item 4, "invit[es] the submission of additional evidence with the appeal" because Form I-120B states that "the petitioner may submit a brief, statement, and/or evidence with this form." Counsel questions whether the AAO is stating not to send any additional evidence with the appeal and that it will not be "considered unless it relates to something that the director put in his denial without first giving notice to the petitioner." The plain meaning of the term "evidence" indicates that a petitioner, on appeal, may submit supporting documentation that has not been previously requested or changes the facts, as presented at the time of filing the previous petition. The intent of the drafters was to provide an opportunity for a petitioner to submit evidence that supports the petition beyond what the director had requested without altering the facts as presented at the time of filing. Moreover, the form does not invite the submission of "additional" evidence rather the form indicates that the petitioner may submit "evidence." Counsel in his interpretation has modified the language to mean that a petitioner may submit the type of additional evidence, at issue, in this proceeding. Counsel's interpretation is, however, incorrect.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4) In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion shall be dismissed.

U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 30 Mass, 3/F

251 Street, N.W.

Washington, D.C. 20536

Administrative Appeals Office
Petitioner: [Redacted]
Beneficiary: [Redacted]

D7

FILE: EAC 02 075 50731

Office: VERMONT SERVICE CENTER

Date: JAN 07 2008

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. § 101(a)(15)(L).

IN BEHALF OF PETITIONER:

PUBLIC COPY

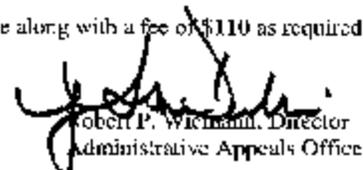
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If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. 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 Citizenship and Immigration Services (CIS) 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. Wichmann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Hwa Lim Industries, Inc., claims to be an affiliate of Hwa Lim Machinery Co. Ltd. located in South Korea. The petitioner is engaged in the import and distribution of commercial pad and screen printing machines and seeks to extend the beneficiary's stay for a third time as its president in the United States for a period of three years at \$432.69 per week. The petitioner was incorporated in the State of Pennsylvania in June 1998 and has claims to have two full-time employees and two commissioned employees.

Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). On May 17, 2002, the director denied the petition and determined that the petitioner had not established that the beneficiary will be employed in an executive capacity for the United States entity.

On appeal, counsel, on behalf of the petitioner, asserts that the beneficiary is primarily engaged in an executive capacity as president and qualifies as an L-1 Intracompany Transferee.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

Further, if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) requires that the petitioner file a petition extension on Form I-129 and except in those

petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired. *Id.*

The issue in this proceeding is whether the beneficiary will be primarily performing managerial or executive duties. 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.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of either capacity.

On January 2, 2002 the director received Form I-129 from the petitioning entity to extend the beneficiary's stay in the United States as its president. On Form I-129, the petitioner described the beneficiary's duties for the U.S. entity as:

Direct and manage corporate import pad and screen printing machines from South Korea, obtain customers, and negotiate sales, service machines through sales representatives, supply parts and service when needed.

On January 2, 2002, the director requested that the petitioner submit additional evidence to assist in determining whether the beneficiary will be primarily employed in an executive or managerial capacity. In particular, the director requested that the petitioner submit the following evidence:

- Sufficiently describe the beneficiary's U.S. duties.

- Staffing of the U.S. organization, indicating the number of employees, duties performed by each employee, and management and personnel structures of the United States firm.
- If the company uses contractors, submit evidence documenting the number of contractors utilized and the duties performed.
- The duties performed by the beneficiary in the past year and the duties he will perform if the petition is extended.

On February 27, 2002, the petitioner responded to the director's request by submitting job descriptions of the beneficiary's duties as an executive. In a letter submitted on behalf of the petitioner, counsel stated that the beneficiary "must engage in complicated economic analyses and then must negotiate sales, as well as having complete discretion over day-to-day activities of his corporation." In addition, the petitioner described the beneficiary's duties as:

- Develop the market in the United States and after a sale is made the company provides customers with parts and service as needed.
- Direct and controls the entire operation.
- Establish goals and policies of the company.
- Planning where the company will go.
- Searches the customers who might have interest.
- If there are complaints, goes to his customer to after-service no matter where they [sic] are.
- Plans to hire more employees in the first half of the year of 2002.
- Receives phone call reports regularly from the foreign organization abroad.

In addition, the petitioner submitted the following job description for the U.S. entity's secretary, Kyung Namking:

- Receives phone calls from the buyers and other business managers and reports the matters to the president.

On May 17, 2002, the director determined that the record was insufficient to demonstrate that the beneficiary will be employed primarily in an executive capacity. The director found that the beneficiary is the person who repairs the products when problems arise and searches out the customers. The director also found that he was unable to determine if the majority of the beneficiary's duties were executive in nature. The petitioner did not submit the percentages of time performing executive duties versus other duties.

On appeal, counsel, on behalf of the petitioner, asserts that the beneficiary is primarily engaged in an executive capacity as president. Counsel also asserts that the full-time secretary performs all the clerical work and secretarial work required by the corporation allowing the beneficiary to spend more time in an executive capacity. In addition, counsel submits a list of the hours of executive and non-executive duties that the beneficiary performs.

Upon review, the beneficiary's title and duties are described utilizing phrases as "establish goals and policies" and "direct the entire operation." These phrases are vague and general. These duties are generalities that fail to enumerate any concrete goals or policies that the beneficiary will establish. The petitioner also fails to elaborate how the beneficiary will direct the entire operation.

In addition, it appears that a significant portion of the beneficiary's duties will be directly providing the services of the United States entity in an effort to procure business as indicated in the record that the beneficiary "develops the market in the United States" and "searches the customers who might have interest." These duties primarily appear to comprise marketing tasks that qualify as performing a task necessary to provide a service or product. An employee who primarily performs the tasks

necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the beneficiary appears to be primarily involved in the daily operations of the U.S. business. The record indicates that the beneficiary "provides customers with parts and service as needed [and] goes to his customer to after-service no matter where they [sic] are." However, it must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities are managerial or executive in nature. The petitioner submitted information to establish the hours the beneficiary actually performs executive duties. However, the evidence indicates that the beneficiary spends a majority of his time marketing the products, negotiating sales, dealing with customer satisfaction, ordering parts, and servicing machines. Since the beneficiary is responsible for daily activities then it appears, at most, that the beneficiary performs operational rather than executive duties. After careful consideration of the evidence, the AAO must conclude that the beneficiary will not be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Moreover, the AAO notes that the petitioner claims that the beneficiary plans to hire more employees in the first half of the year of 2002. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Beyond the decision of the director, the AAO is not persuaded that the employment offered to the beneficiary is temporary in nature. The regulation at 8 C.F.R. § 214.2(1)(3)(vii) provides that, if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. *Id.* While the petitioner for an L classification is required to submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the

United States temporarily, where the beneficiary is claimed to be the owner or majority stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982). The beneficiary's stay in the United States does not appear to be temporary. The record indicates that the beneficiary is the sole stockholder of the U.S. entity and majority stockholder of the foreign entity. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

Beyond the decision of the director, the record also contains insufficient evidence to persuade the AAO that the beneficiary has been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated to establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign entity employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. See *id.* As the appeal will be dismissed, this issue need not be examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.