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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: WAC[redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 20 2005

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[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.

Erica Halda

for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner endeavors to classify the beneficiary as a 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). The petitioner claims to be a wholly owned subsidiary of Liaoming Xingye Foreign Trade Corp., located in China and is engaged in the international trading and investment business. The initial petition was approved for a one-year period to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's president. The petitioner was incorporated in the State of California on March 12, 2001 and claims to have four employees.

On March 14, 2003, the director denied the petition concluding that the petitioner failed to establish that (1) the petitioner had been doing business; (2) the petitioner had the financial ability to compensate the beneficiary and invest sufficient resources in the U.S. organization; (3) the petitioner had secured sufficient physical premises to operate the business; and, (4) the beneficiary had been and will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner's counsel claims that: (1) "the submitted contracts, invoices, packing lists and bills of lading clearly show that the petitioner has been doing substantial business"; (2) "the parent company invested $200,000 to set up the subsidiary"; (3) "the petitioner acts as a distributor of end products . . . .its international trading business is different from the traditional wholesale or import/export businesses, which may require warehouse facilities, workers, inventory controllers, or other first-line operators such as delivery and customer service staff"; and, (4) "the beneficiary's duties in the United States are comprehensive and all at the managerial or executive level."

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within thee 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) requires that a visa petition under section 101(a)(15)(L) of the Act 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 (l)(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.

The first issue in this proceeding is whether the beneficiary has been and will be primarily performing executive or managerial duties for the United States entity. 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.

On August 22, 2002, the petitioner described the beneficiary's proposed U.S. duties on the Form I-129 as "to have managerial responsibility of planning, directing and managing overall business operations of the U.S." Additionally, in a supporting statement, the petitioner described the amount of time the beneficiary spends on the following duties:

- Provide executive direction to management (15%)
  Based on [the beneficiary's] extensive experience with the parent company, he spent approximately 15% of his time providing direction to managerial employees. This will involve briefing management on the practices of the parent company and the goals and policies that should be implemented.

- Establish goals and policies for the U.S. company (25%)
  During the first year of operation, at least 25% of the time were [sic] spent in establishing the goals and policies of the organization. The [p]resident reviewed market reports and other financial data in determining the overall direction the company taken, including the introduction of new products into the export stream and other changes.

- Exercise discretionary decision-making authority in relation to daily business activities (25%)
  Approximately 25% of the time were [sic] spent exercising discretionary decision-making authority over the business activities of [the petitioner.] That includes meetings and discussions with top executives of our major customers; business talks at the final stages of contract negotiations, and

other related issues. The [p]resident does not perform the daily functions of marketing and purchasing, but rather provides managerial supervision based on his experience with the parent organization.

- Make hiring, firing and other personnel decisions regarding managerial employees. (20%)
  During the start-up of our office, it is necessary for the [p]resident to spend more time in this area –up to 20% of his time. As lower level managerial positions are filled, the [p]resident starts to focus more on the overall direction of the company. By the second year of operation, we anticipate that only 5-10% of the [p]resident's time will be tied up in personnel issues.

- Receive general direction from the Board of Directors. (5%)
  The [p]resident meets with the Board of Directors as needed to discuss the progress of the company and receive direction and suggestions from the other directors. This takes approximately 5% of the [p]resident's time.

- Communicate with the parent company (10%)
  The [p]resident continues to communicate with the parent company on a regular basis. He provides information to the parent company related to market developments in the U.S. and any major difficulties or concerns that have arisen. The President also communicates with those who have temporarily assumed his duties abroad and provide [sic] guidance to them. The telephone conferences preparing of reports takes 10% of [the beneficiary's] time.

In addition, the petitioner submitted a U.S. organizational chart and a brief description of the job duties of the vice president, import-export department manager, chief financial officer, and administration manager.

On or about November 11, 2002, the director requested additional evidence. Specifically, the director requested that the petitioner provide: (1) the total number of employees at the U.S. location and a detailed job description for each employee; and, (2) an explanation regarding inconsistencies between the employers listed on the organizational chart and those indicated on the petitioner's Form DE-6 Quarterly Wage Report.

In response, the petitioner claimed that there were five employees at the U.S. location and that the petitioner intended to hire an additional employee in 2003 to work in the import and export department. The petitioner also clarified the Form DE-6 and U.S. organizational chart discrepancies. Additionally, the petitioner submitted a revised U.S. organizational chart, an additional description of the U.S. employees' duties, and a copy of its Forms W-3, Transmittal of Wage and Tax Statements for 2001.

In his decision, the director denied the petition determining that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial

capacity. The director found that the duties described were vague and did not clearly explain what the beneficiary has done or will be doing. In addition, the director found that the majority of the beneficiary's workday appeared to be spent on the day-to-day operations of the U.S. business and that the petitioner lacked a subordinate staff to carry out these duties since all the employees were managerial and executive. The director also noted that there were discrepancies between the two U.S. organizational charts which had not been resolved.

On appeal, the petitioner's counsel claims, "[T]he beneficiary's duties in the United States are comprehensive and all at the managerial or executive level." Counsel resubmits job descriptions for the petitioner's employees. In addition, counsel claims that the "denial of the petition is based mainly upon the staffing levels of the [p]etitioner company, without taking into account the current business situation and the reasonable needs of the subsidiary organization at this stage of development."

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In this matter, counsel on appeal claims that the beneficiary's duties are "all at the managerial or executive level." However, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

On review, the petitioner has not established that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The beneficiary's described duties are vague and fail to describe what the beneficiary will be primarily performing on a day-to-day basis. For example, the petitioner described the beneficiary's duties as "managerial responsibility of planning, directing and managing overall business." However, it is unclear what specific efforts the beneficiary will take to oversee the entire management of the overall business. 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).

Additionally, the petitioner submitted a breakdown of the beneficiary's proposed U.S. duties. However, this description merely paraphrases the statutory definition of executive capacity. *See* Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For example, the petitioner claimed that the beneficiary will be spending 25 percent of his time "[e]stablish[ing] goals and policies for the U.S. company;" 15 percent of his time "[p]rovid[ing] executive direction to management;" 25 percent of his time "[e]xercis[ing] discretionary decision-making authority in relation to daily business activities;" and 20 percent of his time "[m]ak[ing] hiring, firing and other personnel decisions regarding managerial employees." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or

regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, in the supporting letter, titled "brief job duties description," the petitioner claimed, that the beneficiary possesses "extensive experience with the parent company." However, this statement is general and the petitioner failed to explain how the beneficiary will draw upon this knowledge and extensive experience for the benefit of the company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The provided job descriptions do not allow the AAO to determine the duties performed by the beneficiary on a day-to-day basis such that they can be classified as managerial or executive in nature. Thus, the beneficiary's job description fails to establish that he will be employed in a primarily managerial or executive capacity.

Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. The petitioner stated that the beneficiary's proposed U.S. duties included "directing the managerial employees." The record indicated that the beneficiary's subordinates included a named vice president, unnamed CFO, unnamed import and export department employee, unnamed accounting department manager, a named administration manager, and a named manager. The petitioner provided a general description of these employees' duties. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employees. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant matter, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the duties of the beneficiary's subordinates. Nor has the petitioner shown that any of these employees

supervise subordinate staff member or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. At most, the beneficiary may be acting as a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

It has been noted in the record that there are only three named employees working for the U.S. entity and that the beneficiary maintains a full-time position. The petitioner vaguely described these employees' duties. Since the petitioner claimed that the beneficiary supervised three managerial employees, it is unclear as to who would actually perform the services of the business. The AAO notes that all of the employees have managerial or executive titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. There was no evidence in the record of any non-qualifying positions that have been filled, such as for the import and export department that the petitioner claimed had not yet been hired. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See s*ections 101(a)(44)(A) and (B) of the Act.

In addition, on appeal, counsel claims, "[T]he petitioner designates professional employees to manage the execution of contracts, while using the services of a shipping company, freight transportation service, customs service agent, and temporary port storage provider if necessary." However, the AAO notes that the petitioner's 2001 U.S. Corporation Income Tax Return, Form 1120 did not indicate an amount for the cost of labor for these claimed independent contractors. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The petitioner stated that the beneficiary is in charge of "managing overall business operations of the U.S." If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As previously stated 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. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

At the time of filing, the petitioner was a one-year-old international trading and investment company that claimed it would have a gross annual income of one million dollars in 2002. The business employed the beneficiary as president, plus three managerial employees. The AAO notes that all of the employees have managerial or executive titles. As stated previously, the petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and two managerial employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

After careful consideration of the evidence, the AAO concludes that the petitioner has failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the petitioner has secured sufficient physical premises to operate its business. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires that the petitioner secure sufficient physical premises to operate its business.

On August 21, 2002, the petitioner filed the Form I-129 to extend the beneficiary's stay. The petitioner submitted a copy of its lease for the premises located at [redacted] for 598 rentable square feet commencing on June 5, 2001 and ending on June 4, 2003. In addition, the petitioner submitted several photographs of the leased premises.

On March 14, 2003, the director denied the petition in part because the petitioner failed to establish that the petitioner had secured sufficient physical premises to operate the business. The director found that the lease agreement was for general office use only and that the record failed to establish that the petitioner had rented additional warehouse space for storage of mineral, metal scraps, textiles, and animal by-products.

On appeal, the petitioner's counsel claims,

> [T]he petitioner acts as a distributor of end products. . . . its international trading business is different from the traditional wholesale or import/export businesses, which may require warehouse facilities, workers, inventory controllers, or other first-line operators such as delivery and customer service staff. With all the possible support from its parent company, the petitioner locates and negotiates purchase contracts with the U.S. suppliers who are able to meet the products needs of the parent company, and develops relations and negotiates wholesale contracts with the U.S. wholesalers for the distribution of the parent company's products. In the import/export business operation, the petitioner designates professional employees to manage the execution of contracts, while using the services of a shipping company, freight transportation service, customs service agent, and temporary port storage provider if necessary.

On review, the petitioner has established that it secured sufficient physical premises to operate its business as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). Although the submitted lease agreement indicated that the premises shall be used for "general office purposes" and shall not be used for any other purpose without the "prior written consent of Landlord," this use is consistent with that of an international trading company that acts as a distributor of end products as opposed to one that stores the goods that it imports and exports. There is no indication that the petitioner required additional warehouse space for storage of its products even though the petitioner indicated in its brief of the beneficiary's work that the beneficiary's duties included, "the possibility of establishing [a] wholesale distributing center here in America."

After careful consideration of the evidence, the petitioner has established that sufficient physical premises to house the new office had been secured. For this reason, the AAO withdraws this portion of the director's decision.

The third issue in this proceeding is whether the petitioning organization has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner submitted evidence of its U.S. business operations in support of the Form I-129. This evidence included its 2001 Form 1120, U.S. Corporation Income Tax Return, financial statements, contracts, bills of lading, and several invoices.

On March 14, 2003, the director denied the petition, in part, because the petitioner failed to establish that the petitioner had been doing business for the previous year. Specifically, the director noted "the record fails to show that the petitioner has conducted business of exporting or importing any of the products internationally."

On appeal, the petitioner's counsel claims, "[T]he submitted contracts, invoices, packing lists and bills of lading clearly show that the petitioner has been doing substantial business."

On review, the petitioner has established that the U.S. entity has been doing business for the previous year on a regular, systematic, and continuous basis pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(B). The petitioner submitted more than seventeen copies of its invoices dated throughout the previous year, contracts, bills of lading, and packing lists to establish that the petitioner has been doing business as an international trading company.

After careful consideration, the AAO concludes that the petitioner has demonstrated that the U.S. entity had been doing business for the previous year. Accordingly, this portion of the director's decision will be withdrawn.

The final issue in this proceeding is whether the U.S. petitioner, after the initial first year, had the financial ability to invest sufficient funds in the U.S. business and to remunerate the beneficiary.

In his March 14, 2003 decision, the director denied the petition because the petitioner failed to establish that the petitioner had the financial ability to compensate the beneficiary and invest sufficient resources in the U.S. organization.

On appeal, the petitioner's counsel claims, "[T]he parent company invested $200,000 to set up the subsidiary."

The AAO notes that the director cited the regulation at 8 C.F.R. § 204.5(g)(2) in determining whether the petitioner has the financial ability to remunerate the beneficiary. However, this regulation applies to employment-based immigrant petitions for multinational managers and executives under section 203(b)(1)(C) of the Act. A petitioner seeking to extend a nonimmigrant petition that involved the opening of a new office in the United States is only required to submit evidence that the U.S. company has been doing business for the previous year and evidence of the financial status of the U.S. entity. *See* 8 C.F.R. §§ 214.2(l)(14)(ii)(B) and (D). Upon review, the petitioner has met the requirements of the applicable regulations. Accordingly, the director's decision with respect to this issue will be withdrawn.

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 met

that burden in part, but has not overcome all of the director's grounds for denial of the petition. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.