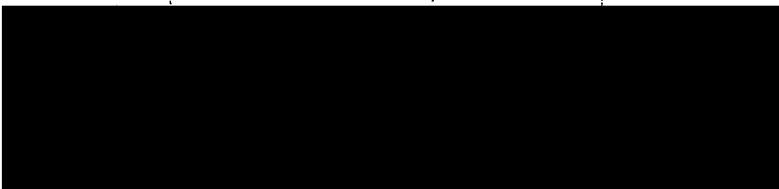




U.S. Citizenship
and Immigration
Services

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File: WAC 05 168 50513 Office: CALIFORNIA SERVICE CENTER Date: DEC 06 2006

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

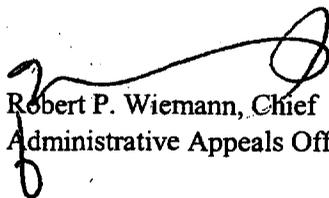
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Nevada corporation that is engaged in the import, export and marketing of diamonds, jewelry and precious stones. The petitioner states that it is a subsidiary of P.D.D. Diamonds, Ltd., located in [REDACTED]. The beneficiary was initially granted one year in L-1A classification to open a new office in the United States and the petitioner now seeks to extend his status for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner disputes the director's findings and asserts that the beneficiary will supervise professional employees who will relieve him from performing the non-managerial and non-executive functions of the business. Counsel submits a brief and documentary evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (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.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in this matter is whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on May 27, 2005. The petitioner indicated on Form I-129 that the beneficiary would serve as president of the eight-person company. In an attached letter from the petitioner, dated May 2, 2005, the petitioner provided the following description of the beneficiary's duties:

[The beneficiary's] responsibilities include directing and managing all development activities of [the petitioner] as they pertain to our U.S. operations. Functioning autonomously, [the beneficiary] was responsible in establishing our U.S. office, develop extensive marketing research and business plans, develop financial projections of US Corporation, hiring and firing of employees and product pricing. In sum, [the beneficiary] has autonomous control over, and exercises wide latitude and discretionary decision making in establishing the most advantageous courses of action for the successful management and direction of our U.S. development activities.

In support of the petition, the petitioner submitted the following list of employees:

- ██████████ - Receptionist
- ██████████ - Shipping & Receiving / Inventory Clerk
- ██████████ - Sales Assistant
- ██████████ - Account Manager / Bookkeeping
- ██████████ - Senior Sales Manager
- ██████████ - Regional Sales Manager
- ██████████ - Regional Sales Manager
- ██████████ - Salesperson

On June 2, 2005, the director requested additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Specifically, the director instructed the petitioner to submit: (1) a copy of the U.S. company's organizational chart identifying all employees by name and job title; (2) a brief description of job duties, educational level and annual salaries/wages for all employees under the beneficiary's supervision; (3) copies of the U.S. company's Nevada quarterly wage reports and IRS Forms 941, Employer's Quarterly Federal Tax Return, for the last four quarters; (4) the U.S. company's payroll summary, IRS Forms W-2 and W-3 for 2004, evidencing wages paid to employees; (5) a specific day-to-day description of the duties the beneficiary has performed over the last six months; (6) a list of specific goals and policies the beneficiary has established over the last six months; and (7) a list of the specific discretionary decisions the beneficiary has exercised over the last six months.

In a response dated June 29, 2005, counsel for the petitioner briefly responded to the director's requests. In response to the director's request for a list of specific policies and goals established by the beneficiary, counsel stated:

Revise sales goals, initiated plan to market specific kinds of diamonds and other precious gems; devised marketing plan to incentivize [sic] existing retail customers to increase sales and change and improve inventory levels.

Counsel also provided the following explanation regarding the specific discretionary decisions exercised by the beneficiary over the last six months:

[The beneficiary] has discretionary decisions to hire or not hire additional office personnel or sale representatives; to hire or not to hire district or regional sales managers; discussed tax liabilities, profit and loss to the company's accountant; hired attorneys for business contracts from various old and new clientele and approved pay raises to office personnel.

Finally, in response to the director's request for a specific day-to-day description of the beneficiary's duties, counsel provided the following information:

Reviews sales reports daily, analyze sales data; communicate with sales representatives. Beneficiary on a daily basis communicates with home office; reviews inventory report. On a monthly basis, beneficiary prepares monthly reports for home office with sales and marketing data and inventory levels.

The petitioner submitted an organizational chart for the U.S. company which identifies the eight subordinate employees included in the original employee list, referenced above. The chart shows that the beneficiary directly supervises the senior sales manager, who in turn has four subordinates, and an account manager/bookkeeper, who in turn supervises the shipping and receiving/inventory clerk and the receptionist. The petitioner provided very brief job descriptions and salary information for each employee and indicated that the senior sales manager, regional sales managers and account manager each possess a "college degree."

In response to the director's requests for state quarterly reports and quarterly federal tax returns for the last four quarters, the petitioner provided a single Nevada quarterly wage report, for the fourth quarter of 2004. The quarterly wage report identified six employees, including the beneficiary, the senior sales manager and the sales assistant. The other employees do not appear on the petitioner's organizational chart and appear to have been terminated prior to the filing of the petition. The petitioner also provided its year-end payroll summary for 2004 and copies of its 2004 IRS Forms W-2, Wage and Tax Statement. The records confirm that the petitioner paid wages to eight employees in 2004. Again, out of these eight employees, only the beneficiary, the senior sales manager, and the sales assistant appear on the petitioner's organizational chart.

The director denied the petition on July 15, 2005, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the documentation submitted in response to the request for evidence confirmed the employment of only two of the beneficiary's claimed subordinates, the sales assistant and senior sales manager, and found that neither of these employees had been shown to be performing in a professional, supervisory or managerial capacity based on the limited job descriptions submitted. The director further observed that although the petitioner claims to be engaged in the import, exporting and marketing of diamonds and precious stones, the company does not have a marketing department or staff. The director concluded that the beneficiary himself would be required to perform general marketing duties that could not be considered managerial or executive in nature, and thus it had not been established that the beneficiary would perform primarily qualifying duties.

Counsel for the petitioner filed the instant appeal on August 11, 2005. In an appellate brief dated September 8, 2005, counsel recites the statutory definition of executive capacity and asserts that the beneficiary performs the high-level duties specified in the definitions and does not spend a majority of his time on day-to-day functions of the company. Specifically, counsel states:

[The beneficiary] has been largely responsible for the company's sales growth and in maintaining consistency of product quality. He has the autonomous control over and exercises wide latitude and discretionary decision making in establishing the most advantageous sources of action for the successful management and direction of [the petitioner's] business and development activities. He has displayed exemplary leadership qualities, which fostered loyalty and harmony among employees.

Counsel further states "a review of the petitioner's needs in light of the overall stage of development of the organization, indicates that the beneficiary's overall managerial or executive duties can be accomplished by current staffing levels." Counsel emphasizes that due to the high volume of sales achieved by the company, the senior sales manager is required to perform professional duties, as well as oversee the regional sales managers and have daily contact with "the marketing consultant." Counsel asserts that the company's sales manager has a bachelor's degree in business and a certificate in gemology. Counsel further asserts that the regional sales managers "perform professional duties based on their duties; as well as the Account Manager."

Counsel addresses the director's observation that the petitioner does not have a marketing department or staff, noting that the petitioner employs an outside marketing consultant, an advertising agency and a publishing

house. In support of this assertion, the petitioner submits: a statement from Moshe Leist Designs, asserting that the studio creates logos, letterhead, catalogs, web site design, newspaper advertisements, flyers, sales presentations and trade show booths for the U.S. company; a letter from Diamonds & JewelryView, indicating that the company provides various internet and e-commerce services for the petitioner, including web hosting and administration and technical advice for Internet diamond trading; and an invoice from Graphics West Fine Commercial Printing.

Counsel asserts that while the petitioner may not possess the organizational complexity found in larger companies, "it is sufficient for this classification that the beneficiary's daily duties are managerial/executive in nature and that he supervises a subordinate staff of professional personnel who will relieve him from performing non[-]qualifying duties."

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. 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). The petitioner's description of the job duties 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.* In addition, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Despite multiple opportunities to provide the detailed description of the beneficiary's duties required by the regulations, none of the submitted job descriptions address the specific managerial or executive job duties to be performed by the beneficiary in the position of president. For instance, in its May 2, 2005 letter, the petitioner describes such vague job responsibilities as "directing and managing all development activities," "develop ... business plans," "hiring and firing employees," and "exercise[ing] wide latitude and discretionary decision making in establishing the most advantageous courses of action." These statements are too ambiguous to convey any understanding of the duties the beneficiary performs on a day-to-day basis, and in part merely restate the statutory definitions of "managerial capacity" and "executive capacity." See §§101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner's failure to address the specific managerial and executive tasks involved in such responsibilities as developing market research, pricing products, or developing financial projections is particularly relevant as these more closely resemble non-qualifying, operational tasks related to the organization's marketing, sales, and financial functions. The petitioner did not specify whether the beneficiary himself will perform market research or related data collection duties associated with product pricing and financial projections, or whether other employees would be involved in these non-qualifying functions, therefore the AAO cannot conclude that the beneficiary would perform managerial duties associated with these functions. The regulations at 8

C.F.R. §§ 214.2(l)(3)(ii) and 214.2(l)(14)(ii)(C) require a detailed description of the beneficiary's daily managerial or executive job duties. 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Upon review of the inadequate job description submitted with the petition, the director reasonably requested a detailed description of the duties the beneficiary performs on a day-to-day basis, specific examples of the goals and policies developed by the beneficiary, as well as examples of discretionary decisions the beneficiary made in the last six months. While the petitioner submitted a response, the evidence submitted did not provide the level of specificity requested by the director, nor did it assist in establishing that the beneficiary's actual duties would be primarily managerial or executive in nature. 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)). For example, the petitioner stated that the beneficiary's "daily" duties include reviewing sales reports, analyzing sales data, communicating with sales representatives and the home office, and reviewing inventory reports, and that the specific "goals and policies" established by the beneficiary have included revising sales goals, initiating marketing plans, and devising retail incentives to increase sales and improve inventory levels. The petitioner did not explain how reviewing and analyzing routine daily reports or developing marketing incentives elevates the beneficiary's position to a managerial or executive capacity, nor did it specify the purpose of the beneficiary's daily communications with the home office or sales representatives.

On appeal, counsel again fails to clarify the beneficiary's actual responsibilities, and instead simply asserts that the beneficiary "does perform the high level of responsibilities that are specified in the definitions" and "does not spend a majority of his time on day to day functions." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

Overall the minimal descriptions submitted suggests that the beneficiary exercises discretion over the U.S. company, but serves in a first-line supervisory capacity over sales matters and personally performs most aspects of the petitioner's marketing function, including both managerial and non-managerial aspects of the function. As noted by the director, the petitioner has not identified any other employees who would be responsible for performing marketing-related duties. On appeal, the petitioner submits evidence that the company utilizes outside resources to design and publish its marketing materials and maintain the company's web site; but it is unclear from the record who is responsible for performing routine market research and planning, if not the beneficiary.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be

managerial or executive functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In addition to failing to provide a sufficient job description to establish the beneficiary's employment in a managerial or executive capacity, the petitioner has failed to submit documentary evidence of its staffing levels as of the date of filing and evidence of wages paid to employees, as required by 8 C.F.R. § 214.2(l)(14)(ii)(D). The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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 this matter, the petitioner claims to employ eight employees in addition to the beneficiary and has submitted an organizational chart identifying its staffing structure and organizational hierarchy. While the petitioner's organizational chart depicts a multi-layered management hierarchy, the petitioner has not provided corroborating documentary evidence to support its claimed staffing levels. The director specifically requested the petitioner's quarterly tax returns and quarterly wage reports for the last four quarters. This evidence is critical, as it would have corroborated the petitioner's claimed staffing levels and assisted in determining whether the company's subordinate staff is sufficient to relieve the beneficiary from performing non-qualifying administrative and operational tasks. The petitioner failed to submit the evidence in response, instead opting to submit evidence of wages paid to employees in 2004, although quarterly wage reports for the first two quarters of 2005 would have been available as of the date the response to the request for evidence was submitted. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In his notice of decision, the director again put the petitioner on notice that its failure to document its staffing levels as of the time of filing seriously undermined its claim that the beneficiary would be employed in a managerial or executive capacity under the extended petition. On appeal, counsel for the petitioner neither addresses the director's observation, nor provides any additional evidence of wages paid to the petitioner's claimed employees in 2005. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Therefore, as concluded by the director, the petitioner has only documented the employment of two subordinates, a senior sales manager who is claimed to supervise the sales personnel and sales department, and a sales assistant who is claimed to contact prospective clientele for appointments and prepare documents and brochures. The petitioner has not provided sufficient evidence that it employs a subordinate staff who would relieve the beneficiary from performing non-qualifying duties, nor established that the reasonable needs of the petitioning company might plausibly be met through the services of the beneficiary as president and these two 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.

As additional evidence of the beneficiary's purported employment as a manager or executive, counsel notes the beneficiary's managerial authority over professional employees. Specifically, the petitioner asserts that the senior sales manager, regional sales managers and account manager perform professional duties. As noted above, the petitioner has not established through corroborating documentary evidence that it actually employed the regional sales managers and account manager as of the date of filing. Also, despite counsel's claim that the senior sales manager is employed in a professional capacity, counsel has not established that this position requires a baccalaureate degree in a specific field of study as a minimum for entry into the field. *See 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) (finding that 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). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *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).

In sum, the petitioner's arguments primarily fail on an evidentiary basis. The lack of a detailed description of the beneficiary's actual duties, considered in conjunction with the petitioner's failure to document the employment of the claimed subordinate staff that would relieve the beneficiary from performing the day-to-day activities of the company, precludes a finding that the beneficiary would be performing primarily managerial or executive duties under the extended petition. For this reason, the appeal will be dismissed.

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.

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ORDER: The appeal is dismissed.