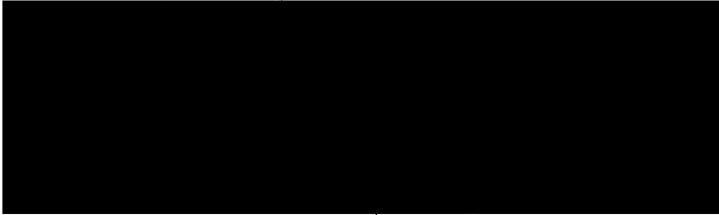


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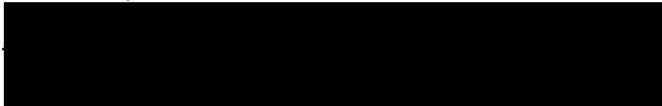
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File: EAC 05 031 52508 Office: VERMONT SERVICE CENTER Date: **NOV 27 2006**

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)

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, Vermont Service Center, denied the petition for a nonimmigrant visa and affirmed her decision on a subsequent motion. 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 general manager 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, a Puerto Rico corporation, states that it is engaged in the editing, production, distribution, and commercialization of textbooks. The petitioner claims that it is the subsidiary of Editorial Escuelas del Futuro S.A., located in Bogota, Colombia. The beneficiary was initially approved for L-1A status in the United States for a one-year period, and the petitioner now seeks to employ the beneficiary for three additional years.

The director denied the petition on February 10, 2005, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity under the extended petition.

The petitioner subsequently filed an appeal on March 25, 2005. The director, finding that the appeal was untimely filed, treated the appeal as a motion to reconsider, and affirmed his previous decision to deny the petition in a decision dated June 2, 2005.

The petitioner filed the instant appeal on July 23, 2005. On appeal, counsel for the petitioner asserts the director erred in confusing the duties of the beneficiary with those of his subordinate within the U.S. company. Counsel further contends that the director failed to take into account the reasonable needs of the petitioner in light of its overall purpose and stage of development. Counsel asserts that a review of the totality of the record establishes the beneficiary's employment in a qualifying managerial or executive capacity. Counsel submits a brief 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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in the present matter is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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 November 15, 2004. The petitioner stated on Form I-129 that the U.S. company has five employees, and indicated that the beneficiary performs the following duties:

As General Manager [the beneficiary] will have overall responsibilities for the destiny of the U.S. Corporation. He will be the most senior level person in the organization responsible for expanding, organizing, directing and developing future ventures in the Island. Specifically, [the beneficiary] will have the following duties to perform: Plan, direct, and coordinate the operations of the newly created company. Duties and responsibilities include formulating policies, managing daily operations, and planning the use of materials and human resources.

The director issued a request for additional evidence on November 22, 2004. In part, the director instructed the petitioner to submit: (1) a complete position description for all employees in the United States, including one for the beneficiary's position, including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis; (2) evidence to establish the duties performed by the beneficiary in the past year and the duties to be performed under the extended petition; (3) an organizational chart for the U.S. company; (4) copies of IRS Forms 941, Employer's Quarterly Federal Tax Return, for the second and third quarters of 2004; (5) a copy of the petitioner's October 2004 payroll; and (6) evidence documenting the number of contractors utilized by the company and the duties they perform, if applicable.

In a response dated January 13, 2005, the foreign entity's general manager indicated that the beneficiary devotes 100 percent of his time to "expanding, organizing, directing and developing future ventures in the Island of Puerto Rico." The foreign entity further explained:

[The beneficiary's] duties and responsibilities performed during the past year, and the duties that he will be performing if the petition is extended, are as follows:

- Starting from an organized, controlled and developed plan of activities which allows a possession of the products of [the petitioner] in the international market. . . studies were performed regarding the potential behavior of the different private clients and officers in each one of the projected countries, according to historic information data and the need of texts of [the company], emphasizing the fulfillment of objectives in each country.
- In order to develop these functions, we began with the formation of a team of collaborators, this is how we interviewed and hired in Puerto Rico the Manager of Promotions and Sales . . . and hired two persons to initiate the promotions and sale of the scholar texts in the different schools in the Island. Once organized the team work, the instructions were given, the sales and promotion activities were planned for the school season in Puerto Rico.
- In the legal and regulatory aspect, all the documentation was gather [sic] in order to register the corporation in the Department of State, with which we could begin to bid with any governmental entity.
- We looked for, located and leased a local for the operations of the corporation.
- We made market investigations, designing polls directed to the private schools to determine the needs in regards to school texts. Also we performed investigations regarding new products to be elaborated and hire[d] authors in the specific subject. . . .
- We visited and spoke to the directors of the Department of Education in the areas of Spanish, Mathematics, Social Studies, Art, and others, to determine the present needs regarding school texts, once we made a balance of these needs, models were elaborated for each area, adjusted to the corresponding curriculums and they were presented to each one of the interested clients.
- From the models elaborated and as a result of a well-performed investigation, the Department of Education of the Commonwealth of Puerto Rico, in the Spanish area, acquire the services "Caligrafia Sacapuntas del K and 6" in the amount of \$5,200 each for a total of 36,400 units with a sales price of \$253,312.50.
- In the editing area, manuscripts from authors are revise, the outline to follow is also revise in order to be in compliance with the programs and chronology of the delivery of the material.
- In the promotions and sales areas, we visit with the promotions and sales personnel to analyze how is the work in each route, to evaluate the projects, verify the proposed goals and in what percentage of compliance we are.
- In the administrative are [sic], we meet with the CPA to analyze and evaluate the financial statements, projections, cash flow, and program the fiscal obligations.

If [the beneficiary's] visa is extended, he will continue to plan the work of monthly and annual promotions, will continue planning the work with the Department of Education, will continue to plan the work with authors, will continue evaluating promotional work, will continue evaluating the work at the Department of Education, and will continue evaluating the work with the authors.

The petitioner submitted an organizational chart indicating that the beneficiary supervises the promotion and sales manager, who in turn supervises two promotion and sales employees. The company also employs a secretary and utilizes the services of an outside accountant. The petitioner submitted evidence to corroborate the employment of the workers identified on the organizational chart.

The petitioner described the Promotion and Sales Manager's duties as follows:

Promotion and Sales Manager

- Detailed elaboration of budgets at a general level in order to develop a sales and promotions policy according to the market requirements in Puerto Rico, 5% of the time
- Implement policies of samples that may enter the market and rationalize the recourse. 3% of the time
- Guide the promotion and sales policies in accordance with the latest marketing and advertising strategies, taking into account the competitors and educational policy. 4% of time.
- Organize capacitation [sic] seminars in sales so that the sales personnel have a better control of the product. 2% of the time.
- Design workshops for the management of the different public and private school[s]... 5% of the time.
- Report to the President of the corporation the results obtained in the execution of the sales budget. 3% of the time.
- Participate in meetings with the department of edition and production. 2% of the time.
- Respond to the President of the corporation in all duties expressed above. 6% of the time.
- Accompany the sales promotion personnel in their daily duties. 70% of the time.

The petitioner further stated that its two sales and promotion employees devote 80 percent of their time to visiting schools and promoting textbooks to teachers, and their remaining time familiarizing themselves with the company's textbooks, planning routes, studying competitors' textbooks, managing merchandise, documentation and monies related to sales, collecting pending invoices, and reporting to the sales and promotion manager. Finally, the petitioner indicated that the secretary is responsible for reception duties, telephone calls, filing, typing and other clerical duties.

The director denied the petition on February 10, 2005, concluding that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity. The director found that the beneficiary would not manage a subordinate staff of managerial, supervisory or professional employees who would relieve him from performing primarily non-qualifying duties required for the daily operation of the

company. The director acknowledged that one of the beneficiary's subordinates possesses a managerial job title, but noted that the petitioner indicated that this employee would spend the majority of his time accompanying the promotion and sales employees in their daily sales routines. The director also found insufficient evidence to establish that the beneficiary manages an essential function of the organization.

The petitioner subsequently filed a late appeal on March 25, 2005, which the director treated as a motion to reopen or reconsider. The director dismissed the motion and affirmed his previous decision on June 2, 2005, without further discussion of the merits of the petition.

The petitioner filed the instant appeal on June 23, 2005. On appeal, counsel for the petitioner asserts that the director "erred in mixing the duties of the Promotion and Sales Manager with those of the beneficiary as General Manager of the enterprise." Counsel asserts that the beneficiary has direct control of the management of the company, establishes its goals and policies, has wide latitude in discretionary decision making, has the authority to hire and fire professional and clerical staff, develops and manages the company's finances and budget, and performs these duties under the general supervision of the board of directors of the petitioner's parent company. Counsel emphasizes that the beneficiary's "primary function" is to "provide comprehensive leadership and integrate diverse operational functions in such areas as marketing, sales, project management, internal (office) management, definitions of operating procedures and practices, (e.g. editing, printing and production of educational texts)."

Counsel further asserts that section 101(a)(44)(C) mandates that U.S. Citizenship and Immigration Services (USCIS) consider the reasonable needs of the organization and its stage of development when reaching a determination regarding a beneficiary's employment in a managerial or executive capacity. Counsel cites an unpublished AAO decision in support of his assertion that the size of a company is not a determinative factor for L-1A petitions. Counsel concludes that a review of the totality of the record and consideration of the reasonable needs of the petitioner should result in a determination that the beneficiary will be employed in a qualifying managerial or executive capacity.

Upon review of the petition and the supporting evidence, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. 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.* Furthermore, 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).

In this matter, the position descriptions provided, considered within the context of the totality of the record, do not sufficiently demonstrate that the beneficiary's tasks will be primarily the high-level responsibilities that are specified in the definitions of managerial and executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). While the beneficiary evidently exercises discretion over the day-to-day

operations of the company, the record does not establish that his duties will be primarily managerial or executive in nature.

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner initially stated that the beneficiary "is responsible for expanding, organizing, directing and developing future ventures," and will "plan, direct and coordinate the operations." The petitioner did not, however, explain what specific tasks are involved in "expanding, organizing, directing and developing" business opportunities such that this responsibility could be considered primarily managerial or executive in nature. Nor can the AAO speculate as to the managerial or executive job duties to be performed by the beneficiary in connection with the "daily operations" the beneficiary will manage and supervise. 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 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

Based on the petitioner's failure to provide an adequate position description in support of the petition, the director reasonably requested a detailed description of the beneficiary's position and a breakdown of the number of hours the beneficiary devotes to his duties on a weekly basis. While the petitioner provided a lengthier position description in response to the director's request, it failed to clarify how the beneficiary allocates his time among his various responsibilities. The petitioner's assertion that the beneficiary devotes 100 percent of his time to "expanding, organizing, directing and developing future ventures" does not assist in establishing that the beneficiary's actual duties are primarily managerial or executive in nature. 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).

Here, the petitioner's failure to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial is particularly critical, as the lengthier position description submitted in response to the director's request for evidence confirms that the beneficiary performs a number of duties which do not fall under the statutory definitions of managerial or executive capacity. The job description is ambiguously written, but suggests that the beneficiary himself is responsible for meeting with customers to determine their needs, elaborating models for the petitioner's products, customizing guidelines for texts according to each customer's requirements, and reviewing and revising manuscripts. None of these duties have been assigned to the beneficiary's subordinates, and it is therefore reasonable to assume that the beneficiary is directly involved in requirements gathering, product planning and product development activities rather than managing or supervising these functions through a subordinate staff. The petitioner also referenced "market investigations" performed by the beneficiary within the scope of the company's product development activities. As the petitioner has declined to clarify how the beneficiary allocates his time on a weekly basis, the record does not establish that these non-qualifying duties were secondary to the managerial functions performed by the beneficiary. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one

“primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has not submitted additional evidence on appeal to clarify the beneficiary's job duties. Instead, counsel merely paraphrases the statutory definition of executive capacity, and asserts that the beneficiary has direct control of the management of the company, establishes its goals and policies, has wide latitude in discretionary decision making, and exercises his responsibilities under the direction of the foreign entity's board of directors. *See* section 101(a)(44)(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. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial operational and administrative duties associated with the development of the petitioner's product. Again, although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The AAO acknowledges counsel's assertion that the director confused the beneficiary's duties with the duties of the promotion and sales manager. Upon review of the director's decision, there is no indication of any such confusion. The director did consider the stated duties of the promotion and sales manager and the petitioner's other employees in order to determine whether the beneficiary would be primarily managing a staff of managerial, supervisory or professional personnel; however, the director did not attribute the duties of any of these employees to the beneficiary. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions: 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Upon review, it appears that the beneficiary will have the authority to hire and fire employees, and that he will devote some portion of his time to managing one supervisory employee, the promotion and sales manager. The petitioner appears to employ a sufficient subordinate staff to perform the majority of day-to-day work associated with the sales and promotion of the company's products. However, the petitioner has not established that supervision of this staff is the beneficiary's primary function, and the beneficiary will not be considered to be employed in a qualifying capacity based on his supervisory duties alone.

Counsel correctly asserts on appeal that, 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.

At the time of filing, the petitioner was a one-year-old company engaged in editing, producing and distributing textbooks customized to the needs of public and private schools in Puerto Rico. The petitioner employs the beneficiary as general manager, a secretary to perform clerical work, and three employees to promote and sell the petitioner's products. As discussed above, the beneficiary himself appears to be solely responsible for the operational tasks associated with researching the market and developing the product according to the customers' needs, including gathering customer requirements, and active involvement in reviewing and revising textbooks. These are the basic operational tasks necessary to produce the petitioner's product and have not been shown to be managerial in nature. The petitioner has also failed to identify who would perform the day-to-day financial and administrative tasks of the company, if not the beneficiary. Based on the evidence submitted, it cannot be concluded that the petitioner employs sufficient employees who would relieve the beneficiary from performing the day-to-day administrative and operational functions of the petitioner's businesses. Rather, based on the evidence submitted, it is evident that the petitioner has employees to sell its products, while all other functions would necessarily be performed by the beneficiary rather than managed by him through subordinate personnel. Regardless, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be primarily employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). As discussed above, the petitioner has not established this essential element of eligibility.

The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The record does not establish that the petitioner, at the end of the first year of operations, had sufficient staff to relieve the beneficiary from non-managerial tasks associated with the research, design and development of its products. Considered in conjunction with the petitioner's failure to provide the requested comprehensive description of the beneficiary's job duties and a meaningful account of how his time is allocated, the totality of the record does not support the petitioner's claim that the beneficiary performs primarily managerial or executive tasks.

Although the petitioner emphasizes that additional staff will be added in the near future, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved

based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a managerial capacity. 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.

ORDER: The appeal is dismissed.