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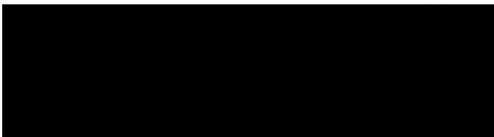
File: WAC 04 084 50309 Office: CALIFORNIA SERVICE CENTER Date: MAR 06 2007

IN RE: Petitioner:  
Beneficiary:



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

IN BEHALF OF PETITIONER:



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 visa petition seeking to employ the beneficiary as its vice president/marketing director 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 corporation organized under the laws of the State of California and is allegedly a flower importer and distributor. The petitioner claims a qualifying relationship as a subsidiary of [REDACTED] of Ecuador. The petitioner seeks to employ the beneficiary for two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily 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 to the petitioner asserts that the director erred by denying the petition on the grounds stated because the director did not ask for a more detailed description of the beneficiary's proposed duties in the Request for Evidence dated March 22, 2004. Counsel submits a brief in support of the appeal, which includes a description of the beneficiary's proposed duties, and asserts that this description establishes that the beneficiary will be employed primarily as a "function" manager for the petitioner.

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 primary issue in the present matter is whether 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.

In the initial petition, 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. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. While the petitioner appears to have narrowed its argument on appeal by claiming that the beneficiary will manage an essential function of the organization, the AAO will adjudicate the appeal as if the petitioner is asserting that the beneficiary will be employed primarily in either a managerial capacity *or* an executive capacity.

In a letter dated January 28, 2004 appended to the initial Form I-129 petition, the petitioner described the beneficiary's proposed duties as follows:

In this position of Marketing Manager, [the beneficiary] will establish and manage [the] marketing department. He has responsibility for procurement of staff, delegation of tasks and positions to the staff members, and outside marketing researchers and other media professionals as the business develops. The staff members will be his direct subordinates. He will be responsible for directing and supervising the daily operation of our marketing department while maintaining an active liaison relationship with the Marketing Department of the Ecuador parent company to ensure worldwide consistency in product labeling and advertising.

The petitioner also provided a 2004 organizational chart placing the beneficiary on the same level as other "vice presidents" reporting directly to the president. The beneficiary is also portrayed as supervising a sales assistant and three "route sales" employees.

On March 22, 2004, the director requested additional evidence. The director requested the following evidence establishing that the beneficiary will be employed primarily in an executive or managerial capacity: (1) an organizational chart for the United States operation which includes job duties and educational levels for those employees supervised by the beneficiary; (2) wage reports for the petitioner's employees (both Forms 941 and California Forms DE-6); and (3) a payroll summary.

In response, counsel to the petitioner provided a job description for the beneficiary materially identical to the description appearing in the January 28, 2004 letter. Counsel also provided a 2003 organizational chart which differs substantially from the 2004 chart appended to the initial petition. Not only does the 2003 chart fail to include a "marketing department," it shows that the beneficiary was apparently employed as a "route sales" employee for the petitioner. According to the record, the beneficiary was admitted to the United States on August 9, 2003 on a B-1/B-2 visa.

Counsel to the petitioner did not provide any job descriptions for beneficiary's prospective subordinates nor did he identify their educational levels. Also, despite the director's specific request, counsel did not provide any of the requested wage reports (Forms 941 or Forms DE-6) for the petitioner's employees.

On August 5, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the director erred by denying the petition on these grounds because the director did not ask for a more detailed description of the beneficiary's proposed duties in the Request for Evidence dated March 22, 2004. Counsel submits a brief in support of the appeal, which includes an uncorroborated description of the beneficiary's proposed duties, and asserts that this description establishes that the beneficiary will be employed primarily as a "function" manager for the petitioner.

Upon review, petitioner's assertions are not persuasive.

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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

As a threshold matter, while counsel to the petitioner attempted to provide a more detailed job description for the beneficiary on appeal, the AAO will consider only the job duties provided by the petitioner in the initial petition and in response to the request for evidence. First, a petitioner cannot on appeal offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Second, the new job description was provided by counsel in his brief and was not corroborated by any evidence. The unsupported statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Therefore, only the original job description will be considered.<sup>1</sup>

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<sup>1</sup>On appeal, counsel asserts that "it is only fair and appropriate" to permit him to materially supplement the beneficiary's job description on appeal because the director did not ask for a more detailed description of the beneficiary's proposed duties in the Request for Evidence. However, the fact that the director did not specifically request a more detailed job description in his Request for Evidence is of no consequence. The director did request additional evidence establishing that the beneficiary will be employed primarily in an executive or managerial capacity including: (1) an organizational chart for the United States operation which

The petitioner has failed to prove that the beneficiary will act in a "managerial" capacity. In support of its petition, 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 states that the beneficiary will "establish and manage the marketing department," will supervise the department's daily operation, and will delegate tasks to staff members. However, the petitioner provides no details regarding what tasks will be delegated and what departmental daily operations will be managed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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).

The petitioner also failed to establish that the beneficiary will supervise and control the work of other supervisory, professional, or managerial employees, or that he will manage an essential function within the organization. The petitioner has provided no job descriptions for its subordinate employees; therefore, it cannot be determined whether these employees are supervisory, professional, or managerial employees. In fact, the petitioner has provided no wage information for its employees whatsoever; therefore, it cannot be determined whether the petitioner even has any employees for the beneficiary to supervise. The beneficiary would appear to be a first-line supervisor, the provider of actual services, or a combination of both. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). 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. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. There is no evidence in the record establishing that the subordinate employee(s) relieve the beneficiary of performing non-qualifying duties, and the petitioner failed to provide any details regarding the subordinate employees which could establish that

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includes job duties and educational levels for those employees supervised by the beneficiary; (2) wage reports for the petitioner's employees (both Forms 941 and California Forms DE-6); and (3) a payroll summary. The petitioner chose to provide limited payroll information and an incomplete organizational chart. The petitioner chose not to provide wage reports or information regarding the subordinate employees. As explained in the decision, the director concluded that the evidence provided by the petitioner failed to establish that the beneficiary will be employed in a managerial or executive capacity. Moreover, the director specifically mentioned the petitioner's failure to provide requested evidence in rendering his decision. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. 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).

they are professionals.<sup>2</sup> Therefore, the record does not prove that the beneficiary will be acting in a managerial capacity.

On appeal, counsel to the petitioner specifically asserts for the first time that the beneficiary manages an essential function of the organization. However, the record does not support this position. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., 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. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's vague job description, and even the job description provided by counsel in his appellate brief, fail to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, as well as a clear explanation of the duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Similarly, the petitioner has failed to prove that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making"

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<sup>2</sup>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).

and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* As indicated above, the petitioner has failed to prove that the beneficiary, who is allegedly managing a few employees who are apparently engaged in providing services to customers, will be acting primarily in an executive capacity.

It is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, the petitioner has provided two organizational charts from two different years which are materially different. While this is not necessarily problematic, both charts show the beneficiary serving in vastly different positions. The 2003 chart lists the beneficiary as a "sales route" employee reporting to both a sales assistant and the vice president of sales and marketing. According to the record, the beneficiary was admitted to the United States on August 9, 2003 on a B-1/B-2 visa. The petitioner's ability to employ the beneficiary given both his B-2 visitor for pleasure admission status and his apparent contemporaneous employment by the foreign entity was not explained. Moreover, the 2004 chart incredibly elevates the beneficiary from "sales route" to marketing director, creating an entirely new department for the beneficiary to supervise and placing him in a supervisory position over both the other "sales route" employees and the sales assistant to whom he used to report. In view of the above, the petitioner's description of the beneficiary's duties and prospective employment is simply not credible. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the record contains insufficient evidence to establish that the overseas company employed the beneficiary for one continuous year within the three years preceding the filing of the petition and that his employment was primarily in a managerial, executive, or specialized knowledge capacity as required by 8 C.F.R. § 214.2(l)(3)(iii) and (iv).

The letter dated January 28, 2004 appended to the initial petition describes the beneficiary's overseas duties as follows: "[The beneficiary] held a top marketing director position with [the foreign entity] from January 2000 through August, 2003." The petitioner provided no other details.

On March 22, 2004, the director requested additional evidence. Specifically, the director requested a more detailed description of the beneficiary's duties abroad, an organizational chart for the foreign entity, and information regarding the other employees of the foreign entity. In response, the petitioner failed to provide further job descriptions for the beneficiary or for the foreign entity's other employees. The petitioner did provide an organizational chart showing the beneficiary supervising two employees and reporting to both a manager and a president.

Upon review, the petitioner did not establish that the beneficiary was employed for one continuous year within the three years preceding the filing of the petition and that his employment was primarily in a managerial, executive, or specialized knowledge capacity. The petitioner has failed to provide any substantive job description for the beneficiary, has failed to describe the duties of the two subordinate employees in Ecuador, and has failed to provide any evidence of past employment overseas. Therefore, the petitioner may not be approved for this additional reason.

Beyond the decision of the director, a related issue is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition shall be accompanied by:

- (A) 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[.]

8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section." A "subsidiary" is defined, in part, as a legal entity "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the initial Form I-129 petition, the petitioner asserts that it is 100% owned by the foreign entity in Ecuador thus, if true, establishing that it is a subsidiary. In support, the petitioner provided articles of incorporation authorizing 1 million shares of stock, a stock certificate issuing 10,000 shares to the foreign entity, evidence that the stock issuance was reported to the State of California, and organizational minutes. The petitioner also provided a copy of the petitioner's president's 2002 IRS Form 1040, Schedule C, showing that the president reports the petitioner's income on his personal tax return.

Upon review, the petitioner has not established that it has a qualifying relationship with the foreign employer.

First, the petitioner has provided insufficient evidence to establish the ownership and control of the United States operation. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate

entity. The corporate stock certificate ledger, stock certificate registry, and corporate bylaws must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Here, the petitioner has provided only a stock certificate and organizational minutes to establish ownership and control. Without full disclosure of all these relevant documents, CIS is unable to determine the elements of ownership and control.

Second, the petitioner's president's reporting of the petitioner's income on his own Form 1040, Schedule C, is inconsistent with the petitioner's assertion that it is 100% owned by a foreign company. The president of the petitioner could only report the petitioner's income on his Form 1040 if he was the owner of the business. The petitioner does not attempt to explain this serious inconsistency in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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

**ORDER:** The appeal is dismissed.