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20 Massachusetts Ave. N.W., Rm. 3000
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U.S. Citizenship
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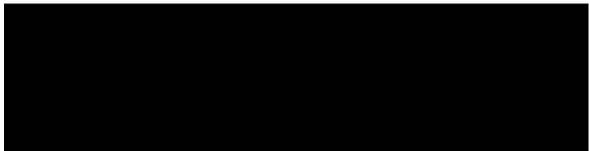
Date: OCT 10 2008

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 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, Vermont 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 beneficiary's employment as 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, a corporation organized in the State of Texas, claims to be doing business as a convenience store and gas station under the name Jet Spot. The petitioner claims that it is the affiliate of Ash's Fashion Collection located in Maharashtra, India. The petitioner has employed the beneficiary in L-1A classification since November 2002 and now seeks to extend the beneficiary's stay for three more years.¹

On May 6, 2008, 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. On appeal, counsel contends that the director's decision was erroneous in law, equity and "the norms of USCIS," and claims that the director erred by failing to conform to prior approvals granted for the same beneficiary.

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.

¹ The record indicates that the beneficiary has been employed in the United States in L-1A classification for five years. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(15)(ii), the total period of stay for an alien employed in a managerial or executive capacity may not exceed seven years. No further extensions may be granted. Therefore, the beneficiary is ineligible for the three year extension as requested.

- (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 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.

The request for extension, filed on Form I-129 on November 15, 2007, indicated that the petitioner currently employed 6 persons. On a document entitled Attachment to Form I-129, the petitioner indicated that the beneficiary would receive an annual salary of \$25,000 and provided the following overview of the beneficiary's duties:

In her capacity as President of the corporation, [the beneficiary] will be responsible for managing, planning and formulation of the business strategy of the company and conducting research of market conditions in local, regional, or national areas to determine potential business opportunities and gather information on competitors, prices, sales, and methods of marketing. She will also conduct feasibility studies in regard to expansion of the business. The Beneficiary's business sense and acumen have proved to be an asset in the past and the Petitioner believes that she is indispensable to its progress. The beneficiary's specific duties are listed in detail below:

- Managing, directing, planning and formulation of the business strategy of the company. Here, the Beneficiary will primarily be involved in managing the company at the top, issuing orders to subordinates including the Store Manager, formulating the plans and strategy as to purchasing, pricing, advertising, and expansion of the business. Establishing long-range objectives and specifying the strategies and actions to achieve them is one of the primary duties of the President where she will develop policies, procedures, methods, or standards. She will provide leadership and vision to manage the corporation.
- Beneficiary will conduct research of market conditions in local, regional, or national areas to determine potential business opportunities so that new stores can be acquired to add to the profitability of the business.
- Establish organizational goals and policies, including development of the strategic plan for the corporation to maximize profits. The Beneficiary will be involved in developing staff policies, directing and coordinating human resource programs, implementing employee agreements, benefit plans and employee compensation plans.
- Beneficiary will also ensure the development and implementation of the operational requirements, organizational structures, and staffing levels.
- Beneficiary will have the authority to hire and fire employees. This includes recruiting, interviewing, selecting, hiring and promoting employees in the organization. As President, Beneficiary will have the authority to select employees.
- Control the work of other employees, including supervisory level employees, providing guidance and direction to subordinates, including setting

performance standards and monitoring performance of each employee, and assigning work to employees.

- Oversee preparation of inventory reports; establish and implement policies to manage and achieve marketing goals; and review financial reports, revenue and expenses. Beneficiary will analyze financial data, operational records, and evaluate management programs.
- Conduct feasibility studies in regard to the expansion of business and development [of] the company's expansion and business development strategy.
- Gather and Evaluate information on competitors, prices, sales, and methods of marketing.
- Negotiate contracts for purchase/lease of new and related business.
- Evaluate the financial aspects of business development, such as budgets, expenditures, investment and profit-loss projections.
- Be responsible for negotiating contracts with vendors and distributors.
- In the performance of her duties the Beneficiary will exercise wide discretion and latitude.

A percentage wise breakdown of her duties is given in the table. As mentioned above and shown in the table below, Beneficiary does not perform the day-to-day functions of the company. The Beneficiary primarily performs the high-level functions as a primary part of her duties.

BREAKDOWN OF DUTIES AT U.S. COMPANY

Direct and manage [the petitioner]	25%
Establish the goals and policies	15%
Supervise and control subordinates	20%
Hire and fire employees	10%
Marketing, Promotion and Negotiations with Suppliers	10%
Overseeing the preparation of inventory reports	10%
Review financial reports, revenues and expenses	10%

The petitioner also submitted copies of Form 941, Employer's Quarterly Federal Tax Return, for the first three quarters of 2007. Although the attachments were not included, each form indicated that the petitioner employed 6 employees during each quarter and paid a total of \$21,000 in wages each quarter.

On January 23, 2008, the director requested additional evidence. Specifically, the director requested a comprehensive description of the beneficiary's duties, as well as a description of duties for all of the petitioner's employees, as well as an organizational chart. The director also requested a breakdown detailing the number of hours the employees devoted to each of their duties on a weekly basis. Additionally, the director requested copies of the petitioner's W-2 Forms for 2006 and 2007, in addition to other documentation such as the petitioner's tax returns, W-3 forms, and 941 forms.

In a letter dated April 16, 2008, counsel for the petitioner responded to the director's request. The petitioner submitted an organizational chart which indicated that the beneficiary, as president, oversaw [REDACTED] Store Manager, who in turn oversaw four employees: [REDACTED], Cashier – Morning Shift; [REDACTED] Cashier – Afternoon/Evening Shift; [REDACTED], Cashier/Stocker; and [REDACTED], Stocker.

Regarding the director's request for a comprehensive description of the beneficiary's duties, the petitioner stated as follows:

The Petitioner offered the position of President to [the beneficiary], who has been engaged in managing and directing the business of [the foreign entity] in an Executive/Managerial capacity since 1995 in India. [The petitioner] has registered the DBA name as Jet Spot. The Petitioner requires the services of [the beneficiary] as the President. [The beneficiary] is at the top of the organizational chart as President, where she performs the duties mentioned below and oversees the Store Manager, who in turn manages the other four employees.

It is noted that the petitioner resubmitted the identical overview of duties, and percentage of time devoted to each duty, submitted with the initial petition and recited above. The petitioner also provided a brief overview of the duties of the store manager, the cashiers and the stockers, but failed to provide a percentage breakdown regarding time devoted to each duties. Further, the petitioner failed to provide the educational requirements for the positions or the level of education attained by each employee despite the director's request.

The petitioner's Form W-3, Transmittal of Wage and Tax Statements for 2007, indicates that the petitioner paid a total of \$84,000 in wages for the year. Copies of W-2 forms were also submitted for all identified employees except [REDACTED]. Although the record includes a W-2 form for "[REDACTED]" it is unclear if this is the same person. Another W-2 form, showing wages paid to Farida [REDACTED], is submitted; however, no mention of the employment of this person was made for the record. Aside from [REDACTED], all of the named persons above also received wages in 2006, as evidence by the W-2 forms for that year.

On May 6, 2008, the director denied the petition, finding that the petitioner failed to establish that the beneficiary would be employed in a qualifying capacity. Specifically, the director found that the beneficiary was not supervising professional employees, and found that the description of duties for the beneficiary provided in response to the request for evidence was exceptionally vague. The director further noted that the petitioner failed to submit a specific breakdown of the time each employee devoted to their claimed duties, and finally noted that the photos of the location demonstrated that all employees occupied similar space at the petitioner's location, thereby suggesting they all performed similar duties.

On appeal, counsel contends that the beneficiary's position is managerial in nature, and contests the director's reliance on factors such as the size of the beneficiary's salary and the lack of professional employees for him to supervise. In support of the appeal, counsel submits a detailed brief.

Upon review, the AAO concurs with the director's findings.

Although the appeal will be dismissed, the AAO notes that the director based his decision, in part, on an improper standard. The director's comments are inappropriate. The director should not hold a petitioner to his undefined and unsupported opinion that the beneficiary's salary and the nature of the petitioner's business render the petitioner ineligible for the benefit sought. The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although Citizenship and Immigration Services (CIS) must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act. For this reason, the director's decision will be withdrawn, in part, as it relates to the salary of the beneficiary and the small size of the petitioning entity.

Despite the petitioner's contentions that the beneficiary functioned in a qualifying position, the information submitted with regard to the beneficiary's position, coupled with the less-than-descript response to the request for additional evidence regarding the beneficiary's position and the position of his subordinates, suggests that the beneficiary performs many of the day-to-day duties required to operate the company, and thus he could not be considered primarily a manager or executive. The AAO will begin by examining the duties of the beneficiary.

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 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 prove 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 petitioner provided a generic description of the beneficiary's duties with the initial petition. In the request for evidence, the director asked the petitioner to submit more detailed evidence outlining the duties delegated to the beneficiary. In response, the petitioner submitted a description of duties that was virtually identical to the one submitted in the initial letter of support, which the director had previously deemed insufficient.

Despite the director's request for a *comprehensive* description of the beneficiary's duties, the petitioner failed to do so. 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). Consequently, the description of duties on record, although it does provide a percentage breakdown of the time the beneficiary allegedly delegates to different tasks, fails to specifically state the exact nature of the beneficiary's duties. More importantly, the petitioner fails to articulate the exact nature of the beneficiary's position with regard to the other staff members and the manner in which they interact. For example, the petitioner claims that the beneficiary is the president and the highest authority in the company, yet the description of duties is essentially a

laundry list of non-specific tasks such as “establish the goals and policies,” “hire and fire employees,” “marketing, promotion and negotiations with suppliers,” and “direct and manage [the petitioner].”

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). In this matter, the recitation of the beneficiary's duties includes an abundance of tasks with no specific outline to clarify to what extent the beneficiary is engaged in each task. For example, “establishing the goals and policies” of the petitioner is too vague to allow the AAO to determine the exact nature of the beneficiary's role in the company. The director afforded the petitioner an opportunity to supplement the record with a more specific description of the beneficiary's duties yet the petitioner failed and/or refused to do so. As a result, the AAO cannot determine the exact nature of the beneficiary's duties in the context of the petitioner's stated business or determine whether her duties are primarily managerial or executive in nature. Moreover, considering that the petitioner's business involves the operation of a gas station and convenience store, the AAO is left to question the extent of managerial duties actual required for such an operation. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Id.* at 1108.

Because a number of the tasks listed in the recitation of duties include tasks traditionally not considered to be primarily managerial or executive, it is impossible to determine that the beneficiary functions solely as manager or executive of the company. For example, the petitioner claims that the beneficiary is “responsible for negotiating contracts with vendors and distributors,” and that “the beneficiary will conduct research of market conditions.” Generally, tasks such as these would appear to be marketing-related and thus non-qualifying; however, the petitioner provides no detail regard the extent of the beneficiary's involvement in these tasks. Instead, the petitioner merely concludes that the beneficiary is at the top of the organizational hierarchy and therefore is primarily a manger or executive. Claims such as these, however, will not suffice. 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.). 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)). Merely claiming that the beneficiary is operating in a qualifying capacity is insufficient for purposes of this analysis.

Another claim of the petitioner is that the beneficiary is responsible for supervising a subordinate staff of five persons. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

Though requested by the director in the request for evidence, the petitioner did not provide the level of education required to perform the duties of its cashiers, stockers, or store manager. Any 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 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). It is reasonable to assume that employees such as cashiers and stockers at a convenience store would not require a baccalaureate degree as a prerequisite for employment. The position of store manager, however, if truly a professional position, may in fact require additional education; however, the petitioner failed to address this request for information by the director so the requirements for this position cannot be determined based on the current record.

Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals. While the petitioner does contend that the store manager supervises subordinate staff members (i.e., the cashiers and stockers), the nature of the petitioner's business makes it difficult to determine the supervisory nature of the position. Since a convenience store/gas station normally operates seven days per week and often remains open from eighteen to twenty-four hours per day, the petitioner has failed to establish that the store manager and the beneficiary would be relieved from engaging in non-qualifying tasks. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner also contends on appeal that the beneficiary could alternatively qualify as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The 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, 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**. 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.** An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not

provided evidence that the beneficiary manages an essential function, as it has neither identified the alleged function nor clearly described the beneficiary's duties associated with managing a function.

In addition, counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS).

In *National Hand Tool Corp.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

The fact that the beneficiary oversees cashiers at a convenience store does not establish that the beneficiary will not be required to engage in day-to-day tasks necessary to operate the business. The petitioner has not set forth the hours of operation of the store or the hours during which the employees work. While it did indicate that one cashier is on the morning shift and the other works the afternoon/evening shift, this information is not enough to provide a conclusive overview of the staffing of the petitioner's store which is likely open seven days per week, with extended operating hours well beyond a 40-hour work week. Therefore, absent a more definitive overview of the petitioner's staffing and shift schedule for all employees, it would appear that the beneficiary would fill in for the rest of the staff when they are not on duty or are short-handed. Absent additional evidence, the AAO is unable to conclude that the beneficiary refrains from engaging in non-qualifying tasks.

The petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). The prior approvals do not preclude CIS from denying an extension of the

original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

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.