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**U.S. Citizenship
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File: WAC-04-108-50231 Office: CALIFORNIA SERVICE CENTER Date: JUL 20 2005

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, Director
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its Vice President and 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 is a corporation organized in the State of California that engages in sales and after sale service of high pressure cleaning machines and related products. The petitioner claims that it is the subsidiary of [REDACTED] located in Taizhou, China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

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 for the petitioner asserts that the director failed to consider the evidence that the petitioner submitted in response to a request for evidence, and that the director erred in not referring to all evidence of the beneficiary's duties for the previous year. In support of these assertions, counsel submits a brief, additional evidence, and documentation already entered into the record of proceeding.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in 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 a letter submitted with the initial petition on March 8, 2004, counsel described the beneficiary's prospective job duties as follows:

In the extension period, Beneficiary plans to further and complete its business objectives of the [petitioner] and the [foreign entity] by establishing attending [sic] more trade shows and establish [sic] more customers in both North America and South American countries. Beneficiary will also set up new development policy and execute plans to accomplish the [petitioner's] goals via hands-on and daily management of the US operations, hiring and termination of its staff and report the financial statues [sic] and deliver timely information to the [foreign entity], forecast growth and financial needs based upon business projections.

In a separate letter dated March 2, 2004, the petitioner added the following regarding the beneficiary's prospective duties:

Beneficiary plans to hire one administrative person to assist Beneficiary to run the administrative functions of the company. hire two or three sales persons to market Petitioner's products and hire one technician to be trained on handling customers' questions on installation, repair and operation of Petitioner's products. In addition, Beneficiary plans to attend 5 industry trade shows to exhibit Petitioner's products and train the sales people to follow up with the potential customers who attended Petitioner's trade booth. Beneficiary plans to set up a sales goal for 2004 for the United States, Canada and South America in the range of \$3 million US Dollars and implement the sales plans among the staff and coordinate the supply logistics with the parent company.

On Form I-129, the petitioner described the beneficiary's prospective duties as follows:

Directing and Managing the [petitioner's] overall Operations, setting up company development policies and goals, governing the company's day-to-day administration and business transactions, delegating duties to subordinates, as well as hiring and termination of high level personnel and being responsible for determining both the short term and long term strategies and goals for the company, exercise wide latitude in decision-making and be responsible only to the foreign company's Board of Directors (re: report the financial status and deliver timely information to the parent company, forecast growth and financial needs based upon business projection)

* * *

[D]irecting and managing the [petitioner's] repair center for returned goods and warranty good [sic]; responsible for setting up company distribution and marketing policies and goals, governing the company's day-to-day administration, delegating duties to subordinates, as well as hiring and termination of high-level personnel and being responsible for determining both the short term and long term

Counsel stated that the petitioner hired one employee as an administrative assistant during the first year of operation, and that the beneficiary is engaged in further recruitment efforts. The petitioner indicated on Form I-129 that it employs one individual. The petitioner explained that its administrative assistant returned to China for personal reasons, yet that she intends to return to the United States and continue employment with the petitioner.

On March 10, 2004, the director requested additional evidence. In part, the director instructed the petitioner as follows:

Clearly demonstrate that the beneficiary, within one year of doing business in the U.S[.], will be employed in an executive or managerial capacity. In this case, the 1-year time frame is from 6/30/2003 to 6/30/2004. This is best [shown] by providing the following:

- The proposed organizational structure showing all positions within one year operating the new office in the U.S. In this case, the 1-year time frame is from 6/30/2003 to 6/30/2004.
- A time table to hire all the proposed positions within one year operating the new office in the U.S. In this case, the 1-year time frame is from 6/30/2003 to 6/30/2004.
- A list of all current employees of the [petitioner], including name, job title and duties, education, salaries/wages, beginning date of employment.

* * *

- Submit the most recent Form 1120 U.S. Corporate Income Tax Return and DE-6, W-2, W-3.
- Submit copies of business plan. The plan should include specific details as to the business to be conducted, and one-year projection for business expenses, sales, gross income and profits or losses.

(Emphasis in original).

In a response dated May 26, 2004, the petitioner submitted a business plan, an audited financial statement as of April 30, 2004, its 2002 IRS Form 1120, U.S. Corporation Income Tax Return, a bank statement dated May 25, 2004, a letter from counsel, and a letter from the beneficiary on behalf of the petitioner. In counsel's letter, he stated the following:

Beneficiary hired one administrative employee at the start of operation and place [sic] advertisement in USA [T]oday for a period of 5 days He did not find anyone that is suited for internal employment of [sic] the [petitioner.] Therefore, his recruiting efforts continued. After identifying experienced high level sales people and executives from the world's largest high pressure cleaning machine manufacturer in the United States, [the beneficiary] spent about 3 months approaching them with competitive compensation packages and he finally persuaded top executives from the largest high pressure cleaning machine company in the world to come work for the [petitioner]

Unfortunately, [the] petitioner did not find any suitable employees and hire them prior to the submission of this Petition and resubmission due to short time restraint of the L-1 visa allowance. However, Petitioner has identified suitable candidates and plans to implement the New Business Plan upon approval by the Parent Company of its budget for the next phase.

In the letter from the beneficiary, he discusses the business operations and goals of the petitioner, including licensing a name brand from an established company. The beneficiary distinguishes the petitioner's products from those of its competitors, and discusses design strategies he discovered at U.S. trade shows. The beneficiary further stated the following:

I felt that I should not rush into hiring people for our old business plan. Since we have invested time and money in our US ventures and I think that we should do it right. If you can give me one year for me to implement our New Plan, we can show you our implementation of our new plan next year with the hiring of high level executives and other US workers and increase our contribution to the United States by our tax payment and expenditures and hiring of US workers.

The petitioner's business plan indicates that the petitioner intends to hire two vice presidents by July 5, 2004.

On June 4, 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. The director stated that “marketing and distribution duties by definition qualify as performing tasks necessary to provide a service or produce a product,” and such duties are not managerial or executive in nature. The director noted that “[t]he record indicates that a preponderance of the beneficiary’s duties have been directly involved in sales or market research. It appears that the beneficiary has been actually performing the services of the business. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service is not considered as employed in a managerial or executive capacity.” The director further stated the following:

The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary on a day-to-day basis. USCIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. Further, the evidence fails to establish that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties.

On appeal, counsel asserts that the director failed to consider the evidence that the petitioner submitted in response to a request for evidence. Specifically, counsel states the following:

The Service erred in failing to view new business plans with specific evidence containing the names of the top executives from its competitors and its plan to hire them each at an annual salary over \$100,000.00 and its further request or provide an opportunity for the Petitioner to provide on-going or current information with regards to the new hires defeats [sic] the purpose of a Request for Evidence as described at 8 C.F.R. Section 103.2(b)(8), i.e., to elicit additional information that clarifies whether eligibility for the benefit sought has been established so as [sic] to warrant a reversal of the Service’s decision inconsistent with the Regulations.

(Emphasis in original). Counsel references the petitioner’s efforts to hire two executives, and asserts that “[t]o expect everything to be in place and submitted within the deadline of L-1 visa extension processing frame is unreasonable and sometimes might appear unfair to impose.” Counsel indicates that, on July 2, 2004, the petitioner hired an attorney to prepare a Form I-129 petition to secure H-1 status for one of its new hires. Counsel further stated that the petitioner finalized an employment agreement for another employee to begin on August 1, 2004, yet the employee decided to postpone employment. Counsel suggests that 8 C.F.R. § 103.2(b)(8) requires Citizenship and Immigration Services (CIS) to allow the petitioner more time to submit ongoing evidence of its business and hiring developments.

Counsel explains that the beneficiary’s sales activity has involved dealing with “mainly . . . large whole sale [sic] or retail operations” Counsel states that “sales contacts have been made in trade shows and sales were consummated after trade shows via email and telephone calls and company visit. On all the sales

activities, Beneficiary was dealing with owners of the business and top executive of the client company. Therefore, Beneficiary was not performing a low level sales job for the Petitioner.” Counsel states that the beneficiary established a call center for customers to obtain product support. Counsel provided that “[the beneficiary] believes that if he can spend less than 5% of his time working to take care of . . . the call rate [there is] no urgent need to staff one person for this position.”

Counsel states that “if [CIS] has questions on how Beneficiary spent his time between his executive duties and other duties, [CIS] should have requested Petitioner to provide Beneficiary’s allocation of time.”

Counsel further asserts that the director erred in not referring to all evidence of the beneficiary's duties for the previous year. In his brief, counsel stated the following:

[CIS] erred in failing to refer to all elements of Petitioner’s proffered evidence of past year’s operations with sales and the executive functions performed by Beneficiary and erroneously concluded that Beneficiary was primarily performing the tasks necessary to produce a product or to provide a service and therefore was not employed in a managerial and executive capacity when the offered evidence clearly indicates that Beneficiary was primarily involved in forming a new company development plan, engaged in discussion with top executives from its competitors and boldly proposed a brand new development policy replacing the old business development plan proposed by its parent company, actively pursuing experienced and capable top executives from its competitors, making plans to lure and hire then for permanent employment with Petitioner, meeting legal experts consulting on employment law issues and licensing issues and approaching name brand companies for licensing right meeting all requirements of Section 101(a)(44)(A) of the Act.

(Emphasis in original). Counsel states that the petitioner does not produce a product in the United States, and it “is not a service company that is involved in the regular and systematic provision of sales and marketing plans for other companies.” Thus, counsel asserts that the beneficiary is not primarily involved with producing the petitioner’s products or providing the petitioner’s services. Counsel claims that the business plan is evidence of the beneficiary’s work during the previous six months. Counsel asserts that the beneficiary devotes little time to returning calls from customers regarding product service and returns. The petitioner submitted a letter from the beneficiary in which he explains that he has spent a small portion of his time addressing customer concerns and returns, and that the need for him to engage in this activity has ceased due to discontinuing sales through a particular retailer.

Upon review, counsel's assertions are not persuasive and the petitioner has failed to show that the beneficiary will be employed in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

As a preliminary matter, it is noted that the director made an erroneous statement in his request for evidence regarding the date on which the petitioner must establish that it is capable of employing the beneficiary in a primarily managerial or executive capacity. The director stated that the petitioner must “demonstrate that the beneficiary, within one year of doing business in the U.S[.], will be employed in an executive or managerial

capacity. In this case, the 1-year time frame is from 6/30/2003 to 6/30/2004.” (Emphasis in original). As June 30, 2003 is the date that the beneficiary first entered the United States in L-1A status, the director represented that the petitioner is afforded one year to open its new office commencing on the date the beneficiary entered the United States.

However, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) that governs new office petitions requires a petitioner to show that “[t]he intended United States operation, within one year of the *approval* of the petition, will support an executive or managerial position.” (Emphasis added). Thus, the date of approval of the initial new office petition determines the beginning of the one-year period in which the petitioner may open a new office. The petitioner’s prior petition (WAC-03-098-50466) to allow the beneficiary to enter the United States in order to open its new office was approved on March 24, 2003, valid from March 18, 2002¹ to March 17, 2004. Accordingly, the petitioner was afforded a one-year period in which to bring its operations to a level sufficient to support the beneficiary in a primarily managerial or executive capacity, ending on March 17, 2004.

Further, any request for an extension of a petition that was originally approved as a new office must be evaluated under the criteria set forth at 8 C.F.R. § 214.2(l)(14)(ii), which requires the petitioner to submit evidence of the beneficiary’s duties during the prior year, the beneficiary’s prospective duties, and the petitioner’s staffing. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States 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 is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In light of the above-discussed regulations, the approval date of the new office petition, not the beneficiary’s date of entry, marks the commencement of the one-year period afforded to the petitioner to open its new office.

As noted above, the director indicated that the petitioner must show that it will support the beneficiary in a primarily managerial or executive capacity by June 30, 2004. Yet, as the present petition was filed on March 8, 2004, the director suggested that the petitioner must establish present eligibility by showing events that will occur in the future. However, a visa petition may not be approved based on speculation of future eligibility or after the petitioner 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). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition.

Based on the foregoing, the petitioner must show that it will support the beneficiary in a primarily managerial or executive capacity as of the date of filing the 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.* The petitioner must specifically state whether the

¹ It is noted that the beginning date of validity, March 18, 2002, constitutes an error, as the petition was not filed until February 7, 2003. It is assumed that the correct date should be March 18, 2003.

beneficiary is primarily employed in a managerial or executive capacity. In the present matter, the beneficiary's job descriptions do not show that he will be primarily engaged with managerial or executive duties. The petitioner's documentation reflects that he will perform significant non-qualifying sales and marketing tasks. For example, the petitioner states the beneficiary will "[attend] more trade shows and establish more customers in both North America and South American countries," which appear to be sales functions. The petitioner explained that the beneficiary will be responsible for "directing and managing the [petitioner's] repair center for returned goods and warranty good [sic]." While this duty does not appear to require a significant amount of the beneficiary's time, it is clearly a non-managerial, non-executive task.

Based on the current record, the AAO is unable to determine whether the claimed managerial and executive duties will constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties will be managerial or executive in nature, and what proportion will be non-qualifying. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Counsel states that "if [CIS] has questions on how Beneficiary spent his time between his executive duties and other duties, [CIS] should have requested Petitioner to provide Beneficiary's allocation of time." Yet, on appeal counsel and the petitioner fail to submit an explanation of how the beneficiary will apportion his time. Thus, counsel's statement is unpersuasive.

The job descriptions for the beneficiary contain substantial portions that do not relate to the status of the petitioner as of the filing date. Specifically, the beneficiary's stated duties contain numerous references to his authority over subordinate employees and delegation of tasks. However, as of the date of filing, the beneficiary is the petitioner's sole employee, and thus there are no subordinates to supervise. The facts that the petitioner has conducted recruiting efforts and has entered into agreements to hire additional staff are not probative of the petitioner's eligibility as of the filing date, and the beneficiary's duties relating to these prospective employees will not be considered. Again, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In discussing the petitioner's hiring efforts, counsel asserts that "[t]o expect everything to be in place and submitted within the deadline of L-1 visa extension processing frame is unreasonable and sometimes might appear unfair to impose." Counsel suggests that 8 C.F.R. § 103.2(b)(8) requires CIS to allow the petitioner more time to submit ongoing evidence of its business and hiring developments. Yet, once again the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Evidence of business and hiring activity that occurs after the date of filing is not relevant to the petitioner's eligibility in these proceedings. Further, the regulation at 8 C.F.R. § 103.2(b)(8) states that "the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted." As the director afforded the petitioner 84 days to submit additional evidence of its eligibility, including evidence of its staffing, he satisfied the requirements of 8 C.F.R. § 103.2(b)(8). Contrary to counsel's assertion, nothing in 8 C.F.R. § 103.2(b)(8) requires the director to allow an open-ended period in which the petitioner may supplement the record of proceeding.

As noted above, the beneficiary is the petitioner's sole employee. This fact is confirmed on Form I-129. Though the petitioner hired an administrative assistant, the petitioner stated that this employee returned to China. The evidence of record is not clear as to whether this individual will return to the petitioner's employ.

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. Again, there is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

In the instant matter, the petitioner's business needs require its employees to perform numerous non-qualifying duties such as contacting potential customers, representing the petitioner at trade shows, answering questions about merchandise, operating a customer support call center, paying routine bills and managing a checking account, arranging for shipment of purchased goods from the parent company, and providing U.S. customers with replacement parts. In fact, as confirmed by the petitioner's business plan, the primary function of the petitioner is sales and support on behalf of the foreign entity. As the beneficiary is the sole employee of the petitioner, it is evident that he must perform all of these non-managerial and non-executive tasks. The petitioner has failed to show that these duties do not constitute the majority of the beneficiary's time.

Counsel's assertion that the director failed to view the petitioner's new business plans and evidence in response to the request for evidence is not persuasive. In discussing the new evidence, counsel makes frequent reference to the petitioner's future plans. However, as discussed above, business activity and hiring that occurs after the date of filing is not probative of the petitioner's eligibility as of the filing date. The director was not required to consider evidence of speculative future activity, and nothing in the director's decision or evidence of record suggests that the director erroneously disregarded relevant documentation.

Counsel asserts that the director erred in failing to refer to all elements of the petitioner's proffered evidence of the past year's operations. However, the beneficiary's activities over the past year are not at issue. The relevant inquiry is whether the beneficiary will be employed in a primarily managerial or executive capacity in the future, commencing on the filing date. While the beneficiary may have achieved significant accomplishments toward establishing the petitioner's operations in the United States, the petitioner has not shown that it has reached the point that he will be employed in a primarily managerial or executive capacity as of the filing date.

Based on the foregoing, 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)(ii).

In visa 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 director's decision will be affirmed and the appeal will be dismissed.

ORDER: The appeal is dismissed.