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File: WAC 04 248 50498 Office: CALIFORNIA SERVICE CENTER Date: **AUG 30 2006**

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its branch 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 is engaged in the wholesale trade of digital audio products and other electronic equipment. The petitioner is a subsidiary of Hyun Won, Inc., located in Youngcheon, Korea. The beneficiary was initially granted a one-year period of stay in L-1A status in order to open a new office in the United States, and the petitioner now seeks to extend his stay for three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily 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, the petitioner asserts that the beneficiary performs both managerial and executive duties, and contends that the beneficiary will be supervising managerial employees, including a department of the petitioner's parent company. The petitioner submits a brief in support of the appeal.

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

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

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

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

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

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

The issue in this matter is whether the petitioner established that the beneficiary will be employed in a 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 petition was filed on September 15, 2004. In an appended August 26, 2004 letter, the petitioner described the beneficiary's job duties as follows:

As a Branch Manager, [the beneficiary] will be essentially unsupervised except by the president and the board of directors of the parent company, and his duties will entail directing the overall management and controlling of the enterprise, establishing policy and goals, and exercising wide latitude in discretionary decision-making in consultation with the parent company. In addition to the foregoing managerial duties, [the beneficiary] will also coordinate and manage all business operations and supervise over market research and advertisement. The key elements of his duties are: (1) Department of General Administration: management of overall operation of the company including personnel affairs, financial activities and establishment of a business plan; (2) Department of Import & Sales: Searching for potential business partners, distributors and agencies, checking the schedule of import/export, collecting and sending samples of products which can be traded by the parent company and consult with potential vendors/buyers in coordination with the parent company. The following is itemized duties the beneficiary is performing as the Branch Manager of the U.S. Subsidiary.

- (1) Hire and manage subordinate employees
- (2) Search and set-up a warehouse to store the parent company's products which will be distributed in the U.S. market
- (3) Hire IP technicians to set up web site, On-line A/S center and On-line shopping mall for local customers
- (4) Supervise launching of the parent company's products in Mass Merchant Retail Shops, for instance, BestBuy, Target, CompuUSA, Radio Shack and Gateway.com, etc.

- (5) Launch the parent company's product on on-line shopping mall, for instance, Amazon.com, Cnet.com, Dealttime.com and Buy.com, etc.
- (6) Supervise production and distribution of product catalogue to advertise the company and its products
- (7) Establish and manage technical support center and R&D center in the U.S.A.
- (8) Manage our current partners and customers . . .
- (9) Meet with new partners and business partners
- (10) Report directly to the president and board of directors of the parent company

The petitioner submitted an organizational chart for the U.S. entity which depicts the beneficiary's position over four departments, including Marketing/Product, Administration, Import/Export and Customer Support. The chart depicts one employee in the marketing/product department, and one employee in the customer support department, and indicates that employees will be hired to staff the other departments. The petitioner outlined the functional areas of responsibility of each department in its August 26, 2004 letter. The petitioner also submitted its California Form DE-6, Employer's Quarterly Wage and Withholding Report, for the second quarter of 2004, confirming employment of the beneficiary and the two employees identified by name on the organizational chart.

The director issued a request for additional evidence on September 25, 2004, in part requesting: a description of the duties to be performed by the beneficiary in the United States, the number and positions of employees who will be working under the beneficiary's supervision; the job title of the beneficiary's supervisor; and a complete organizational chart specifically identifying the beneficiary and all other employees by name and job title.

In a response dated December 10, 2004, counsel for the petitioner provided the following job description for the beneficiary:

- (1) Decision-Making
  - Directing the overall management and control of the enterprise, including participating in the establishment of policies and goals;
  - Exercising a wide latitude in discretionary decision-making;
  - Determining when and where the company's product is to be shipped in respect to the imported products, and relationship with vendors;
  - Planning for the lateral expansion and investment for a product plan for internal production in the U.S.; and
  - Reviewing and deciding marketing strategy for new customers and new products.
- (2) Human Resource Management
  - Directing and supervising two (2) managers directly and the Overseas Sales & Marketing Department with four (4) managers in the foreign parent company; and
  - Managing and controlling the company including hiring, firing, promoting and demoting of personnel. The beneficiary will also be responsible for managing and controlling the work of other enterprise managers.

- (3) Customer and other Business Management
  - Directing and managing communication with customers and vendors;
  - Reviewing and deciding strategies to improve the corporate image and satisfying the local customers' needs in the U.S.;
  - Planning and formulating aspects of research and development projects, and developing long range goals and objectives; and
  - Exercises complete discretion over the enterprise's day-to-day operations.
  
- (4) Coordination with Foreign Parent Company
  - Coordinating with the import and distribution schedules and sales volumes in accordance with sales and marketing strategies in the U.S.;
  - Coordinating with the Overseas Sales & Marketing Dept. Manager and its supervisors regarding marketing strategies and information and export products to U.S. and other countries such as Canada, Netherlands and China.
  - Attending the many related shows and seminars held in the U.S. Europe, Asia, Korea and making report to the Board of Directors of the foreign parent company and evaluating the business activities and making the necessary changes according to the new market situation and adapts them to new business policies and goals.

The petitioner stated that the beneficiary directly supervises the managers of the marketing and product department and the customer support department. The petitioner indicated that the manager of the marketing and product department is responsible for directing and supervising the sales department, coordinating all sales activities between headquarters and sales representatives; researching market conditions in local, regional, or national areas to determine potential customers; and determining the demands for products and services. The petitioner stated that the manager of the customer support department is responsible for directing and coordinating sales support and marketing department; directing and supervising shipping and handling and coordinating with other department managers. The petitioner further stated that the beneficiary coordinates with the parent company's overseas sales and marketing department. Finally, the petitioner reiterated that the U.S. company intends to hire additional managerial employees and subordinates to staff its import/export and administration departments.

The petitioner submitted a revised organizational chart which depicts the beneficiary over the manager of the marketing/product department, the manager of the customer support department, an un-staffed import/export department, and the overseas sales and marketing department of the parent company, which is staffed by a manager for the European market, and three assistant managers with responsibility for the European, Asian, and Middle East markets, respectively.

The director denied the petition on December 29, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the beneficiary supervised only two employees as of the date of filing, and noted that the beneficiary's claimed responsibility for managing a department of the foreign entity would not be considered as evidence that he will be employed in a qualifying capacity with the U.S. entity. The director

further noted that the job descriptions provided were broad and non-specific, and failed to establish what tasks the beneficiary would perform on a day-to-day basis. The director concluded that a preponderance of the beneficiary's duties would be directly providing the services of the organization and supervising two non-professional employees, and found that the petitioner had not reached a level of organizational complexity required to support the beneficiary in a primarily managerial or executive position.

On appeal, the petitioner asserts that the beneficiary is required to perform both managerial and executive duties. The petitioner claims that the beneficiary's two subordinates perform "managerial duties of carrying out the responsibilities of their departments," although they do not yet have subordinate employees. The petitioner again emphasizes that the U.S. company intends to hire two additional managers to oversee the administration and import/export departments. The petitioner asserts that four members of the foreign entity's overseas marketing and sales department have been placed under the beneficiary's supervision "for the sake of maximizing efficiency in overseas sales and marketing." Finally, the petitioner states that the U.S. company will soon emerge from its start-up stage and has a realistic expectation for substantial growth.

Upon review, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

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 chooses to represent 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. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

As noted by the director, a portion of the beneficiary's position description merely paraphrases the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For example, the petitioner indicates that the beneficiary will be "directing the overall management and controlling of the enterprise, establishing policy and goals, and exercising wide latitude in discretionary decision making," supervised only by the president and board of directors of the company. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

The remainder of the initial position description indicates that the "key elements" of the beneficiary's duties will include the functions of the "general administration" and "import and sales" departments, which have not yet been staffed by subordinate employees. As part of his responsibility for the general administration

department, the beneficiary is responsible for day-to-day financial and accounting activities, inventory and warehouse functions, and, presumably, other routine administrative tasks necessary for the business to function, including banking, invoicing, and collecting payments. Similarly, the beneficiary's responsibility for the "import and sales" department includes duties which would not fall under traditional definitions of managerial or executive capacity. These non-qualifying duties include searching for potential "partners, distributors and agencies," checking import/export schedules, collecting and sending samples of products, and consulting with potential vendors and suppliers." The petitioner's description of this department indicates that its functions also include importing products from Korea, searching for suitable places to sell the products, performing market research, and controlling product distribution. Again, based on the petitioner's representations, these non-managerial, non-executive duties are reasonably assumed to be assigned to the beneficiary while the department remains un-staffed. Overall, the petitioner's initial description of the beneficiary's duties depicted an employee who is directly performing import, sales, inventory, financial and routine administrative tasks, rather than managing these activities. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner submitted a lengthy, but vague description which again paraphrased the statutory definitions of managerial and executive capacity, and focused on the beneficiary's roles in "decision making," "human resources management," "customer and other business management," and "coordination with the foreign parent company." The job description emphasized the beneficiary's responsibility for "directing and supervising" two managers in the United States and four managers of the foreign parent company," as well as "managing and controlling the work of other enterprise managers." The job description also referenced the beneficiary's responsibilities for planning and policy making, "directing and managing" communication with vendors and customers," planning and formulating projects, developing long-range objectives, reviewing and deciding strategies, and exercising discretion over operations. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the AAO notes that when responding to the request for evidence, the petitioner removed the un-staffed administration department from its organizational chart (and the associated administrative and financial duties from the beneficiary's job description), and added the foreign entity's overseas sales and marketing department, placing this department, which appears to be responsible for Asian, European and Middle Eastern sales and marketing activities, under the beneficiary's supervision. The petitioner failed to offer an explanation as to why these foreign employees were not included on its initial organizational chart. The petitioner also referred to the beneficiary's management and control of other "enterprise managers," but failed to identify these employees, their location, their job titles or their job duties. 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)). Finally, the petitioner stated that all sales activities would fall under the responsibility of its “marketing and product department” manager, although the petitioner initially included these activities in the “import/export and sales department,” which remains under the beneficiary’s responsibility. 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. 582, 591-92 (BIA 1988).

Overall, the initial description appeared to have the beneficiary doing more of the actual day-to-day work of the business, while the second iteration of the job description has the beneficiary managing more of the actual work done in the petitioner's operation. Similarly, the revised organizational chart and job description submitted in response to the request for evidence suggests an attempt to convey the existence of a more complex organizational structure under the beneficiary’s supervision than that depicted by the initial evidence.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). 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). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description and raised questions as to the petitioner’s actual organizational structure and the beneficiary’s areas of responsibility. Therefore, the analysis of this criterion will be based on the job description and organizational chart submitted with the initial petition.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second the petitioner must show that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940, F.2d 1533 (Table) 1991 WL 144470 (9<sup>th</sup> Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties related to operational or policy management, not to the non-managerial and non-executive duties of the company.

Accordingly, determining whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are “primarily” managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The word “primarily” is defined as “at first,” principally,’ or “chiefly.” *Webster’s II New College Dictionary* 877 (2001). Where an individual is “principally” or “chiefly” performing the tasks necessary to produce a product or to provide a service, that individual cannot also be “principally” or “chiefly” performing managerial or executive duties. Here, the petitioner fails to document

what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial, non-executive functions. The petitioner lists the beneficiary's duties as including both qualifying tasks and administrative and operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because, as discussed above, many of the beneficiary's daily tasks, including the financial, administrative, sales and import-related duties of the administration and import and sales departments, do not fall directly under traditional managerial duties as defined in the statute. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

While the beneficiary evidently exercises discretion over the U.S. company's operations, the fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(44)(A) and (B) of the Act. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Here, the petitioner has not established that the beneficiary will primarily perform managerial or executive duties consistent with the statutory definitions.

The petitioner emphasizes that the U.S. company is still completing its start-up phase and suggests that the director failed to take this circumstance into account when adjudicating the petition. 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, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the record shows that the beneficiary is performing the day-to-day functions of two of the U.S. company's four departments one year following approval of the "new office" petition and thus does not demonstrate that the beneficiary is relieved from performing non-qualifying tasks.

The petitioner's claim on appeal that the beneficiary supervises managerial employees is not supported by the record. 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. When examining the managerial or executive capacity of a beneficiary, CIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers

of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

Thus, while both of the beneficiary's subordinates are designated as department managers, the record indicates that both "managers," who have no direct subordinates and have not been shown to indirectly supervise outside staff, necessarily perform the actual day-to-day marketing and customer service tasks of their respective departments. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a managerial or executive position based on his supervisory duties.

The petitioner indicates that the U.S. company intends to hire additional staff and expand its operations in the near future. However, 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. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements.

Based on the foregoing discussion, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

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

**ORDER:** The appeal is dismissed.