U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: MAY 07 2013 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition, and 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 classify the beneficiary 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 limited liability company organized under the laws of the State of Delaware, claims to be engaged in business and real estate development. It states that it is a wholly-owned subsidiary of located in Belgium. The petitioner seeks to employ the beneficiary as its managing director to open its new office in the United States.

The director denied the petition, concluding that the petitioner failed to establish: (1) a qualifying relationship existed between the petitioner and the foreign entity; (2) that it had secured sufficient physical premises to house the new office; and (3) that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

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 asserts that the petitioner clearly established that it has a qualifying relationship with the foreign entity and that the director's erroneous interpretation of documentary evidence resulted in the denial on this basis. Counsel further claims that the proffered position is managerial in nature and that the petitioner would in fact be able to support the beneficiary's employment in this capacity after the first year of operations. In support of these contentions, counsel submits a brief and additional evidence.

I. The Law

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(*1*) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(*2*) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(*3*) The organizational structure of the foreign entity.

II. The Issues on Appeal

A. Qualifying Relationship

The AAO will first review the director's findings regarding the claimed qualifying relationship in this matter. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner claimed in the initial petition that it is the subsidiary of [redacted] located in Belgium, and that [redacted] was its sole owner. In support of this contention, the petitioner submitted a copy of its Certificate of Formation filed in the State of Delaware on May 31, 2012, and a copy of its operating agreement, which indicates at Exhibit A that [redacted] is its sole member.

In response to the director's request for additional evidence (RFE), which requested evidence demonstrating that the petitioner was doing business as defined by the regulations, the petitioner submitted documentation pertaining to a limited liability company identified as [redacted] Specifically, this documentation, which named the beneficiary as a 33.33% owner of Hillside, was submitted as evidence of one of the petitioner's business investments. The director, however, reviewed the ownership structure of Hillside and erroneously concluded that the members of [redacted] were in fact the members and owners of the petitioner, thereby prompting the director's denial for the lack of a qualifying relationship.

Upon review, the AAO acknowledges the petitioner's assertions on appeal, which clarify that the [redacted] documentation was submitted in support of the contention that the petitioner was doing business as required by the regulations. The director's misinterpretation of this document resulted in the erroneous denial of the petition on the basis that there was no qualifying relationship between the petitioner and [redacted] The AAO finds that the petitioner has submitted sufficient evidence establishing that a qualifying relationship exists with [redacted] Consequently, the director's findings with regard to this issue are hereby withdrawn.

B. Physical Premises

The next issue before the AAO is whether the petitioner has secured sufficient physical premises to house the new office as required under 8 C.F.R. § 214.2(l)(3)(v)(A). Specifically, both counsel and the petitioner assert that the petitioner's lease for a "virtual office" establishes that sufficient physical premises have been secured.

In support of the petition, the foreign employer submitted a letter dated June 18, 2012, stating that it "trades, invests in, and develops real estate, commercial as well as residential, and in other business enterprises, such as project management, finances, construction works, buying and selling products, and consulting and management services." Regarding the petitioner, the foreign entity claimed that it is opening a new office in the United States to pursue its investment activities and currently has opened a "virtual office" for this purpose.

The petitioner submitted a document titled [redacted] (the "Agreement"). The Agreement identifies its start date as July 1, 2012, and indicates that for a monthly fee of $250, the petitioner will be permitted access to the day office suite and the conference room facilities at the [redacted] location with ten days' notice. Additional services provided under this agreement included: (1) use of the [redacted] mailing address; (2) eight hours of use per month of the conference room with at least two days' notice; (3) handling of incoming mail; and (4) listing of the petitioner's name on the building lobby tenant directory.

On August 24, 2012, the director requested additional evidence. The director requested evidence establishing that the petitioner has secured sufficient physical premises to house the new office, and evidence that the United States operation, within one year of the approval of the petition, will support an executive or managerial position.

In response, counsel reiterated that the petitioner has secured a "virtual office" which provides the petitioner with "an office, communication services, and secretarial and other professional and business services on an as needed basis. The petitioner also submitted a document entitled "Customer Profile Form," which outlined the manner in which the petitioner's phone calls were to be answered and how calls were to be routed.

On October 29, 2012, the director denied the petition concluding that the petitioner failed to establish that it has secured sufficient physical premises to house the new office. The director noted that the petitioner had not submitted sufficient evidence to permit the petitioner to commence "doing business," and noted that failure to submit evidence that precludes a material line of inquiry shall be grounds for denying the petition.

On appeal, counsel asserts that the petitioner established that it has secured sufficient physical premises to house the new office, and notes that, while it will engage in construction services pursuant to its business, it will not require an office or warehouse since the construction services it requires will be performed by outside contractors.

Upon review, the petitioner's assertions are not persuasive.

As the beneficiary is coming to the United States to open a "new office," the petitioner must establish that "[s]ufficient physical premises to house the new office have been secured." 8 C.F.R. § 214.2(l)(3)(v)(A). While the regulations do not define what type of premises should be considered "sufficient," the regulations do clearly require the petitioner to secure "physical" premises. The regulations also require all petitioners, including "new offices," to be "qualifying organizations." *See* 8 C.F.R. § 214.2(l)(3)(i); 8 C.F.R. § 214.2(l)(1)(ii)(G). A "qualifying organization" is defined in part as a corporation which "[i]s or will be doing business. . . for the duration of the alien's stay in the United States as an intracompany transferee." In turn, "doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H).

In view of the above, a petitioner seeking to open a new office must secure "physical" premises which will be sufficient to permit the enterprise to commence doing business and to expand to the point where there would be an actual need for a manager or executive who will primarily perform qualifying duties. While there is no prohibition on a petitioner moving to a different location during its first year of operation, the petitioner must nevertheless establish that the physical premises secured will sufficiently permit the petitioner to both "do business" and to develop to the point that the beneficiary will be primarily performing qualifying duties at the end of the first year of operations.

In this matter, the petitioner admits that it did not secure physical premises to house the new office. Regardless, even if the petitioner's "Agreement" permitting it to have limited access to shared facilities could

be considered to be the securing of "physical" premises, the record is devoid of any evidence that these premises would be sufficient for the operation of the petitioner's business. Although the Agreement submitted by the petitioner indicates that it has secured a "virtual" office, it does not indicate that the petitioner actually acquired a service that would permit it to occupy any dedicated physical space for its business. Instead, the Agreement indicates that the petitioner will receive mail handling services, telephone answering services, and use of a shared conference room for eight hours per month upon providing the required advance notice. Therefore, for this reason alone, the petition may not be approved.

In addition, the petitioner has failed to establish that the premises secured will be sufficient to permit the enterprise to commence "doing business" and to expand to the point where there would be an actual need for a manager or executive who will primarily perform qualifying duties. As indicated above, the petitioner plans to operate a business and real estate development business.

As the premises in question, i.e., the "virtual office" which provides the petitioner with mail and phone services as well as use of shared facilities, would not be sufficient to accommodate a real estate development business which will be "doing business" and would not permit the business to expand during its first year in operations, the petitioner has failed to establish that the premises are "sufficient." In fact, given the petitioner's admission that the arrangement will be "temporary," it appears that even the petitioner acknowledges that this arrangement is insufficient.

The petitioner and counsel claim that despite being engaged in real estate development, the petitioner itself will not engage in actual construction or manufacturing activities, and therefore contends that the virtual office is sufficient for its business needs. Specifically, counsel claims in response to the RFE that the petitioner will hire construction firms to perform the services required for its business, and that the beneficiary will be tasked with hiring support personnel and independent contractors as business dictates. Given that the petitioner intends on hiring additional employees, the petitioner did not submit any documentation with its petition, in response to the Request for Evidence, or with its appeal, to establish how its "virtual" location would be "sufficient" to accommodate the new office.

Accordingly, the petitioner has failed to establish that it has secured sufficient physical premises to house the new office. Accordingly the appeal will be dismissed.

C. Ability to Support a Managerial or Executive Position

The final issue addressed by the director is whether the petitioner has established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of

the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The petitioner in this matter has failed to establish that the United States operation would expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. Specifically, the petitioner has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C).

As contemplated by the regulations, a business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

The petitioner's "business plan" vaguely describes the United States operation as a proposed real estate development business, and identifies by address several properties that the petitioner is considering as investment opportunities. However, it does not provide projections regarding revenue, income, expenses, or financial goals. Moreover, neither the business plan nor any other evidence in the record explains the proposed organizational structure with regarding to staffing or a hiring timetable, which would explain the manner in which the beneficiary would ultimately be relieved from performing non-qualifying duties. Absent a detailed, credible description of the petitioner's proposed United States business operation addressing the petitioner's proposed product, marketing plan, customers, staffing, and income/expense projections, the petitioner has not met its burden to establish how the proposed enterprise will develop to the point where there would be an actual need for a manager or executive who will primarily perform qualifying duties within one year. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Although the petitioner has submitted documentation evidencing that a profit was earned through the acquisition (via Paepschenstoel) and ultimate resale of the property known as this evidence alone is insufficient to satisfy the requirements of 8 C.F.R. § 214.2(l)(3)(v)(C). While this evidence serves as an example of the type of business dealings in which the petitioner claims it will engage, the record is devoid of a specific plan or outline demonstrating the existence and timeframe of future investments, the amount of expense involved and projected revenue expected from each investment, and the manner in which such investments will warrant the hiring of a subordinate staff to perform non-qualifying duties currently assigned to the beneficiary. Instead, it appears as though the beneficiary, in an individual capacity, will continue to acquire and sell real estate without the need for additional staff members or subordinate employees.[1]

Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for the above reasons.

D. Employment in a Managerial or Executive Capacity Abroad

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years. 8 C.F.R. § 214.2(l)(3)(v)(B).

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

[1] The AAO notes that counsel, on appeal, refers to two unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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 foreign employer described the beneficiary's duties abroad in a letter dated June 18, 2012 as follows:

> He plans, directs, manages and coordinates the operational activities of the company through permanent and temporary employees and independent contractors. He formulates policies and business strategies and finds new opportunities for investment; and develops relationships with new clients and enhances relationships with existing clients.

An additional letter from the foreign entity, addressed to counsel and dated June 18, 2012, indicated that in addition to the beneficiary, it employed only one other person on a part-time basis. The foreign entity failed to provide any details regarding the position title of this part-time employee or the nature of his position within the company.

Upon review, the petitioner has failed to establish that the beneficiary was employed abroad in an executive or managerial capacity.

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary acted in a "managerial" or "executive" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary did on a day-to-day basis. For example, the petitioner asserts that the beneficiary "plans, directs, manages and coordinates the operational activities." However, the petitioner does not define these operational activities. Overly broad statements such as "formulates policies and business strategies" are not probative of the beneficiary

performing managerial or executive duties. The mere fact that the petitioner gave the beneficiary a managerial title and may have been the sole managerial employee does not establish that the beneficiary was actually performing "managerial" or "executive" duties. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As explained in the record, the beneficiary appears to have supervised only one other individual who was employed abroad on a part-time basis. The petitioner has provided no details regarding the nature of this employee's position, and has therefore not established that this employee was primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that this employee, as well as the beneficiary, was performing the tasks necessary to produce a product or to provide a service in the operation of the business.

In view of the above, the beneficiary would appear to have been primarily a first-line supervisor of a non-professional employee, the provider of actual services, or a combination of both. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, the petitioner has not established that the beneficiary managed professional employees. Therefore, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary acted primarily in an executive capacity. The job description provided for the

beneficiary is so vague that the AAO cannot deduce what the beneficiary did on a day-to-day basis. Moreover, as explained above, the beneficiary appears to have been primarily employed as a first-line supervisor and was performing the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity

Finally, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that U.S. Citizenship and Immigration Services (USCIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

Accordingly, the petitioner has not established that the beneficiary has been employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and the petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

IV. Conclusion

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.