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**U.S. Citizenship
and Immigration
Services**

DATE: **AUG 20 2013**

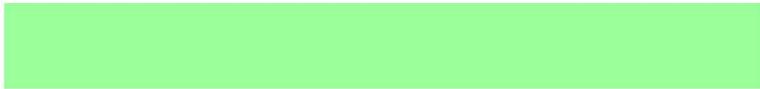
OFFICE: TEXAS SERVICE CENTER

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IN RE:

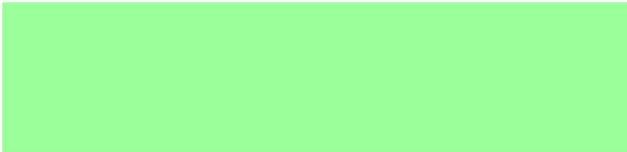
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, revoked the approval of the employment-based immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a corporation engaged in software development and support, specializing in the outsourcing of networking and technology services to clients in manufacturing, financial services, healthcare, and other industries. The petitioner is the wholly-owned subsidiary of [REDACTED] which in turn is a [REDACTED]. The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(1)(C). It seeks to employ the beneficiary as a "Business Development Manager" at a salary of \$87,632 per year.

The director initially approved the petition on April 22, 2010. On July 17, 2012, the director issued a notice of intent to revoke approval of the petition. After reviewing the petitioner's rebuttal, the director revoked the approval of the petition on February 14, 2013 based on a finding that the petitioner failed to establish: (1) that it would employ the beneficiary in a qualifying managerial or executive capacity; and (2) that the petitioner's foreign parent company employed the beneficiary in qualifying 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 evidence of record is sufficient to establish that the beneficiary was employed abroad and will be employed in the United States in a qualifying managerial capacity.

I. The Law

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Defining the term managerial capacity, section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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.

Governing the revocation of an immigrant visa petition, section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." Depending on the factual circumstances of the case, revocation may be effectuated either automatically or on notice. See 8 C.F.R. §§ 205.1 and 205.2.

Regarding revocation on notice, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time

the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

II. U.S. Employment in a Managerial Capacity

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial capacity. The petitioner does not claim that the beneficiary will be employed in an executive capacity.

A. Facts

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on April 22, 2010. The petitioner states that its parent company, located in India, is a leading global information technology enterprise that designs and builds information technology architecture for Fortune 500 Companies in the financial services, logistics and technology industries. The petitioner indicated that its group employs 25,000 people worldwide and operate in nine countries.

The petitioner stated that it originally transferred the beneficiary to the United States in March 2005 "to facilitate the improvement of [the company's] sale unit's business procedures, practices and operations." In a letter dated April 9, 2010, the petitioner stated that the beneficiary will perform the following duties in the proffered position of Business Development Manager:

- Direct strategic sales, formulating market strategy and governance for the organization's sale force structure.
- Work with the Chief Sales Officer to establish and implement the organization's sales force structure and governance;
- Build and maintain alliances and partnerships in the region to enable the identification of joint business opportunities with partner organizations to implement [the petitioner's] services to best meet the needs of the alliance.
- Responsible for end-to-end management of large scale business development deals;
- Direct project development efforts to build profitable relationships with new and existing local, national and international accounts;
- Develop and implement business strategy and identify gaps in interoffice project communication, and resolve those issues between [petitioner] locations;

- Manage account managers and leads to ensure implementation of processes for seamless product transitions and operations management;
- Manage business and project development process through accounts reports including account P&L, account growth, and overall client satisfaction;
- Perform a liaison role between offshore and onsite development teams, and lead business efforts to build profitable relationship with new and existing local, national, international, and corporate accounts;
- Keep all relevant stakeholders informed of current project implementations and overall operations performance, and ensure quality customer coordination for pre- and post project activities;
- Lead the career development and setting performance objectives for individuals, and assist them with career assessment based on performance reviews, training recommendations, salary evaluations and compensations[.]

The petitioner's letter also provided an expanded description of the position. Briefly, the petitioner stated that the beneficiary's time would be allocated to the following areas of responsibility: Establish and Implement Market Strategy and Governance (25%); Partnerships and Business Plan Implementation (25%); Coordinate Activities of Project Teams and Subordinates (20%); Field Marketing (15%); Communication (10%); and Miscellaneous (5%)

The petitioner submitted an organizational chart depicting the beneficiary as "Business Development Manager (Strategic Sales and Governance)," reporting to the Chief Sales Officer – Americas, who reports to the company's CEO. The petitioner indicated that the beneficiary supervises an account manager and the Senior Manager – Sales office and provided detailed position descriptions for both of the beneficiary's subordinates.

The director initially approved the petition. On July 17, 2012, the director issued a notice of intent to revoke the approval, in which the director advised the petitioner that the U.S. Department of State returned the petition to USCIS for further review because it appeared the beneficiary was not eligible for the requested benefit. With respect to the beneficiary's proposed employment, the director fully cited the position description included in the petitioner's April 9, 2010 letter. The director went on to state:

It is noted that the statements provided by the petitioner with Form I-140 are contradicted by the statements provided by the petitioner with Forms I-129H filed on behalf of the beneficiary on August 17, 2006 and July 28, 2009. Both I-129s indicate that the beneficiary is to be employed in the US in the position of Management Analyst II, which is a different title than the one listed on Form I-140.

It is also noted that on Form G-325 which accompanies Form I-485, Application to Register Permanent Residence or Adjust Status, filed by the beneficiary on November 22, 2010; the beneficiary states that he is currently employed with the petitioner in the position of Management Analyst II, [the] position he has held since April of 2005.

The director quoted the job duties for the position of Management Analyst II as stated in the petitioner's letters in support of the nonimmigrant petitions it filed on the beneficiary's behalf in 2006 and 2009.

The director requested that the petitioner clarify the beneficiary's job title and provide a description of his specific daily duties, the percentage of time spent on each duty, an organizational chart clearly showing the number of subordinates reporting to the beneficiary, and information regarding the subordinates, including job titles, duties and evidence of their educational level.

In its response to the notice of intent to revoke, the petitioner explained that the beneficiary was transferred to the United States in H-1B status to fill the position of Management Analyst, and that he was later promoted to the position of Management Analyst II in 2009. The petitioner explained that it offered the beneficiary the permanent position of Business Development Manager based on his prior experience and performance. The petitioner stated that the beneficiary has been working as Business Development Manager since obtaining his Employment Authorization Document in March 2011. The petitioner further stated:

8 CFR Section 204.5(j)(5) states that the petitioner must demonstrate that an offer of future managerial employment is being made to the beneficiary. This future employment is to begin once the beneficiary receives his permanent residence.

There is no mention in the regulations or guidance that the beneficiary of an EB-1 petition must be employed in a managerial capacity during the interim (in between his transfer to the U.S. and when his future offer takes effect upon becoming a permanent resident). During the interim, he may remain in the U.S. on a nonimmigrant status such as H-1B, but there is no requirement that he must be employed in a managerial capacity during that time.

The petitioner stated that "the H1B petitions and the I-140 petition filed on behalf of the beneficiary are not contradictory. They refer to different positions offered to the beneficiary for different periods of time." The petitioner provided a five-page description of the duties of the Business Development Manager position as offered in April 2010, and a seven-page description of the duties the beneficiary was performing as a Business Development Manager as of August 2012. The petitioner explained that the beneficiary's managerial duties had further expanded since he first assumed the position in March 2011.

The petitioner explained that the role offered to the beneficiary as of April 2010 was Business Development Manager for Strategic Sales and Governance. The petitioner provided a detailed explanation of how the company is structured and described the role of the Strategic Sales and Governance component as follows:

This group has its span of influence across the entire Americas regions, across all Industry/Customer Units and Horizontals. This group is responsible for strategy, operational planning, and governance for the entire Americas region, new partnerships and business plans, large deals and transactions, and field marketing. This group is the overarching executive management team which oversees strategy and governance for all business units and horizontals.

The petitioner provided additional details regarding the beneficiary's proposed duties and re-submitted the organizational chart provided at the time of filing, along with evidence of educational qualifications for both the account manager and senior manager – sales office. The petitioner emphasized that both subordinates are professional employees and "high level individuals who are responsible for managing strategic partnerships and sales governance." The petitioner stated that the beneficiary currently serves as business development manager for a different business unit, with responsibility for \$100 million in revenue and a larger subordinate staff.

The director revoked the approval of the petition on February 14, 2013. The director acknowledged the petitioner's explanation regarding the Management Analyst II position that the beneficiary previously held in H-1B status. The director then recited the position description provided at the time of filing, summarized the expanded five-page description of the position submitted in response to the RFE, and concluded, without additional discussion: "The petitioner's description of the beneficiary's proposed duties in the U.S. does not indicate that the beneficiary will be employed in a managerial or executive capacity."

B. Analysis

Upon review, the petitioner has established that it will employ the beneficiary in a primarily managerial capacity.

The petitioner established that the proffered position would involve managing the Strategic Sales and Governance function for the company's entire Americas region. The petitioner explained that the position would involve development and implementation of strategies and operational plans across business units that would have an impact upon operations in the entire region, and that he would function at a senior level within the company's sales organization, reporting to the Chief Sales Officer for the Americas, who in turn reports to the petitioner's CEO.

The petitioner also provided an extremely detailed description of the proffered position sufficient to establish that the beneficiary would be performing high-level functions that fall within the statutory definition of managerial capacity. As noted above, the director failed to provide any support for his conclusion that the duties described are not qualifying in nature. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

Further the evidence submitted establishes that the beneficiary would supervise and control the work of professional employees and possess authority to recommend personnel actions for employees under his supervision. *See* sections 101(a)(44)(A)(ii) and (iii) of the Act.

The petitioner has indicated that the beneficiary has since assumed a different business development management role within the organization, and submitted evidence that such position is substantially similar to the role offered at the time of filing and will be in a qualifying managerial capacity.

While the beneficiary may be required to apply his business expertise in carrying out his responsibilities at times, the petitioner need only establish that the beneficiary will "primarily" devote his time to qualifying duties. Sec. 101(a)(44)(A) of the Act. The petitioner has met that burden. The director's determination to the contrary will be withdrawn.

III. Foreign Employment in a Managerial Capacity

The remaining issue addressed by the director is whether the petitioner established that the foreign entity employed the beneficiary in a qualifying managerial capacity.

A. Facts

The petitioner indicates that the beneficiary held the position of Account Manager for its Indian parent company from May 2003 until March 2005. The petitioner's initial letter included a two-page description of the beneficiary's duties in this role. Briefly, the petitioner indicated that the beneficiary's time was allocated among the following areas of responsibility: Migrate all account management processes from client locations to project teams in India (20%); Manage the Request for Proposal (RFP) process across multiple stakeholders (40%); Manage the commercial function that was responsible for invoicing, collections management and client reporting (20%); Manage the Resource Forecasting and Management process for the client operations (5%); and Manage the client / prospect visit process to our Delivery Centers (15%). The petitioner explained that the role involved partnering with both business development and project teams throughout the design and implementation of client engagements.

The petitioner submitted an organizational chart for the Indian company which identifies his position as account manager, reporting directly to the Head of Sales Enhancement Team and indirectly to a Regional Director. The Head of Sales Enhancement Team reports to the President-IT Services. The chart indicates that the beneficiary supervised two account managers and provided their position descriptions.

In the notice of intent to revoke, the director advised the petitioner that "the evidence shows that the beneficiary was performing the tasks necessary to produce a product or to provide services." The director requested a definitive statement from the foreign company addressing the beneficiary's position title, all specific daily duties, and the percentage of time he spent on each duty. The director also requested an organizational chart showing the number of subordinate managers/supervisors or other employees who reported directly to the beneficiary, and instructed the petitioner to provide their job titles, job duties, and evidence of their education credentials. Finally, the director advised the petitioner that, if the beneficiary did not supervise employees, it should specify the essential function he managed.

In response to the notice of intent to revoke, the petitioner stated that the beneficiary was responsible for "managing a team of professionals in the execution of presales and commercial account activities until he was transferred to the U.S." Specifically, the petitioner indicated that the beneficiary "managed the Presales and Commercial function for [the petitioner's] Banking & Capital Markets Unit." The petitioner provided a nine-page explanation of the beneficiary's duties and responsibilities within the context of the Indian company's structure during his period of employment.

The petitioner explained that the beneficiary's division focused on providing IT consulting services to corporations in the Banking & Capital Markets industry, and noted that one of the largest accounts he managed was [REDACTED], which brought in over \$17 million in revenue in 2005. The petitioner indicated that due to the volume of business, the foreign entity has an entire subdivision dedicated to servicing this account. The petitioner stated that the beneficiary exercised discretionary decision-making with respect to presales and commercial process management for the [REDACTED] subdivision with respect to the following areas: strategy, goals and objectives; size, staffing, hiring and performance, and managing business metrics.

The petitioner also provided a detailed description of the request for proposal process, noting that a typical team working on an RFP includes an architect, a business analyst, a delivery manager, a usability analyst, and a pricing analyst. The petitioner explained that each pursuit takes three to six months, and that the beneficiary and his team completed approximately 50 proposals during his nearly two years in the position. The petitioner provided a list of 20 proposals accepted by [REDACTED] for execution during the beneficiary's tenure and provided a sample RFP response prepared by the beneficiary's team. The petitioner also provided a detailed flow chart describing the proposal process and the responsibilities of all personnel involved in the process.

The petitioner submitted an organizational chart indicating that the beneficiary supervised the "Pre-Sales and Commercial Organization" with two subordinate account managers, one responsible for "Commercial Processes, Resource Forecasting & Management" and one responsible for the "Requests for Proposals, Client Visit Process." The chart shows that one account manager had three direct report staff (all commercial executives) and two indirect report staff (Finance SPOC and HR SPOC), while the other account manager supervised temporary pre-sales teams comprised of architects, business analysts, project managers, usability analysts and pricing analysts. The petitioner provided position descriptions for all positions subordinate to the beneficiary and educational credentials for the beneficiary's direct subordinates.

Upon reviewing the petitioner's response, the director revoked the approval of the petition, concluding that the petitioner failed to establish that the foreign entity employed the beneficiary in a primarily managerial capacity. In denying the petition, the director found that the two organizational charts in the record "illustrate the beneficiary as the manager of two different teams with two different groups of people." The director acknowledged the petitioner's claims that the beneficiary managed an essential function for the foreign entity, but stated that such claim was contradicted by its statement that the beneficiary also supervised professional personnel.

The director further quoted a portion of the position description provided in response to the notice of intent to revoke and concluded that, based on the petitioner's statements, 80 percent of the beneficiary's time was spent performing "non-managerial activities such as customer service (customer care)" and his remaining duties were consistent with those of a management analyst.

Finally, the director added that "USCIS records show that in his 2003 visa application the beneficiary stated that he was employed by [the foreign entity] in the position of Business Analyst. In 2004, the beneficiary stated that he was employed by [the foreign entity] in the position of Management Analyst."

The director's introduction of this potentially derogatory information in the Notice of Revocation was inappropriate and his comments regarding the beneficiary's visa applications will be withdrawn. A revocation can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations specified in the notice of intent to revoke. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988). Where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained. *See Matter of Estime*, 19 I&N Dec. at 450; *see also* 8 C.F.R. § 103.2(b)(16)(i).

Further, it is noted that the petitioner submitted documentary evidence dated contemporaneously from 2004 which identifies the beneficiary's position title within the foreign entity as "Account Manager" for the account and there is no reason to doubt the authenticity of this evidence.

On appeal, counsel for the petitioner asserts that the beneficiary "spent the majority of his time as an Account Manager performing job duties in a managerial capacity as a functional manager of the Presales/Commercial function." Counsel provides the following explanation:

[The beneficiary] was responsible for the operational management of the request for proposals process, the migration of account management processes, commercial function, client relations with company executives, and management of client operations. [The beneficiary] was not responsible for performing the actual duties related to this function (such as preparing the proposal drafts or managing the offshore project teams).

Counsel objects to the director's finding that the beneficiary allocated 80 percent of his time performing non-qualifying "customer care" duties, and contends that the director's assessment "does not accurately convey the importance of [the beneficiary's] role within the organization. Counsel asserts that, rather than providing "customer service" to the company's clients, he operated at a senior level within the organization and managed the Presales/Commercial function within his business vertical/unit by overseeing and guiding others in the RFP process, setting up account management operations processes to be followed by project managers and their teams, established strategies for the statement of work and collections process for the business vertical/unit, and performed other high-level managerial job duties that could not reasonably be classified as "customer care." Counsel asserts that the beneficiary's duties were different from those of a manager who supervises employees engaged in project delivery and that he held a higher-level role with responsibility for managing the pre-sales function for multiple projects with the assistance of subordinate professionals.

B. Analysis

Upon review, counsel's assertions are persuasive. The petitioner has established that the foreign entity employed the beneficiary as a function manager.

The term "function manager" applies generally when a beneficiary may not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a job description that clearly explains the duties performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

We do not agree with the director's conclusion that 100% of the beneficiary's time was allocated between non-qualifying "customer care" and "analysis" functions. The AAO recognizes that the detailed description provided indicates that the beneficiary allocated some time to performing non-qualifying tasks incidental to managing the pre-sales and commercial function for the foreign entity's major client. However, upon review of the record as a whole, it is unclear how the director arrived at the conclusion that the beneficiary allocated all of his time, or even a majority of his time, to non-managerial duties. In its response to the notice of intent to revoke, the petitioner devoted nine pages to explaining in great detail the beneficiary's day-to-day duties and the significance of such duties within the scope of the function he managed.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where few or no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

Here, the petitioner indicates that the beneficiary managed a small team comprised of professional employees and held additional responsibility for reviewing the work of all parties involved in the RFP process for the business unit established for the foreign entity's largest client, which generated revenues in excess of \$17 million. The beneficiary also held responsibility for establishing processes and policies related to the pre-sales and commercial function within his business unit and exercised discretion over the functions he managed.

While the beneficiary was required to apply his business expertise in carrying out his job duties and perform some operational or administrative tasks, the petitioner has established by a preponderance of the evidence that the majority of the day-to-day non-managerial tasks associated with the function he managed were performed by other employees involved in the RFP process. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). As the statutory definition discusses managerial capacity as a function of the duties that the

beneficiary "primarily" performs, the petitioner need only establish that the beneficiary devoted more than half of his time to managerial duties. The petitioner has met that burden.

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, the petitioner has sustained that burden. Accordingly, the director's decision dated February 14, 2013 is withdrawn and the petition is approved.

ORDER: The appeal is sustained.