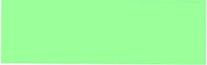


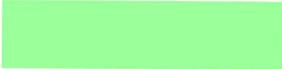
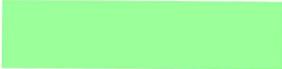


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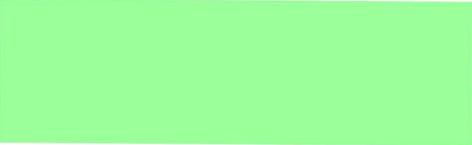
(b)(6)



DATE: **FEB 14 2013** OFFICE: TEXAS SERVICE CENTER FILE: 

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 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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to 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

(b)(6)

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner filed an appeal. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida limited liability company that seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On March 2, 2012 the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel asserts that the director failed to adequately consider the petitioner's evidence and erred in the interpretation of the law primarily because the petitioner had already received two approvals granting the beneficiary L-1A nonimmigrant classification for the same position. Counsel submits a legal brief in support of the appeal.

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 or managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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

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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.

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.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means 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.

II. Employment in a Managerial or Executive Capacity

The petitioner filed the immigrant visa petition (Form I-140) on March 28, 2011. The petitioner asserted that the beneficiary would be serving in a managerial or executive capacity as president of the company. The petitioner states that it distributes musical instruments and engages in property management with four (4) employees and a gross annual income of \$554,792.00. In support of the petition, petitioner submitted a letter dated February 21, 2011 signed by the president explaining his job responsibilities as follows:

1) Been responsible for the day-to-day operations of the company, including inventory and sales; 2) Performed market research to investigate new distribution possibilities; 3) Overseen the development of creative marketing and sales programs to promote business; and 4) Been responsible for all personnel decisions, including the contracting independent contractors.

As President, [the beneficiary] fulfills all company operational requirements. He is responsible for all hiring and firing of personnel, organizing and determining sales territories and quotas, etc. He is also responsible for compliance with all governmental regulations, shipping options, customs clearances, and proper record keeping.

The petitioner provided copies of the beneficiary's IRS Form W-2, Wage and Tax Statement, issued to the beneficiary for 2010; the IRS Form 941 Employer's Quarterly Federal Tax Return for the 4th quarter of 2010 indicating that the petitioner had three employees, and the Florida Form UCT-6, Department of Revenue Employer's Quarterly Report, reflecting wages paid to four employees during the fourth quarter of 2010.

On November 17, 2011, the director issued a request for additional evidence (RFE) instructing the petitioner to provide evidence that the beneficiary's employment qualifies as either managerial or executive. Additionally, the director requested a breakdown of time the beneficiary would spend on his various duties. The director specifically requested that the petitioner provide the job title, job duties, percentage of time spent on each duty, and educational level for all employees reporting to the beneficiary, and further requested that the petitioner indicate the number of subordinate managers/supervisors subordinate to him. Further, if the beneficiary did not supervise other employees, the director requested the petitioner to specify what essential function within the organization the beneficiary manages.

On February 7, 2012 and in response to the RFE, Counsel submitted a letter on behalf of the petitioner. In paragraph four of the letter, counsel explained that the beneficiary spends approximately 60% of his time on the following at both the U.S. and foreign company:

- He prepares, creates and modifies the company's measurable goals, strategic plans and operations and objectives and determines the methodology to assess whether the company is making suitable progress towards achieving those goals and objectives (35% of 60%);

- For the overall corporation, determine necessary on-going funding for the U.S. company, developing a workable budget and assessing financial commitment of the parent company and determines financial assessments for the foreign company (25% of the 60%);
- For the overall corporation, work with business brokers, attorneys, real estate agents and other professionals to seek out potential business opportunities and review proposals, financials and due diligence assessments to determine feasibility of additional investments (20% of the 60%);
- For the overall corporation, ultimately determines the direction of the company, reports to the parent company on suitability of its subsidiary venture and makes and executes decisions to enable additional acquisitions and management (20% of the 60%);
- For the first business activity in the US, the Beneficiary spends approximately 40% engaged in the following duties:
 - Conduct needs assessment and determine appropriate staffing levels the [sic] recruit, hire and train staff (40% of the 40%);
 - Establish policies, processes and procedures for the day-to-day business operations and oversee their implementation (30% of the 40%);
 - Assess historical advertising and marketing activities, determine necessary actions and calculate budgetary requirements and authorize expenditures (15% of the 40%);
 - Negotiate contracts to obtain optimal inventory and control costs, ensure compliance with all government agencies and ensure all licenses are adequately maintained (10% of the 40%);
 - Prepare reports, modify business plans and develop business (5% of the 40%)

In the same letter, counsel included the following description of the beneficiary's duties:

He is responsible for the day-to-day operations of the company, including inventory and sales. He plans, develops and establishes policies and objectives to obtain optimum profitability and highest corporate gain. He directs the administration and infrastructure of the U.S. entity. He has complete control over all financial, administrative, personnel, marketing and sales decisions. He also coordinates new distributions possibilities, negotiates, finalizes and signs contract; analyzes costs and determines profit margins, tracks incoming funding and receivables; manages fundamental issues such as permits, legal affairs, contracts, and funding, insurance matters and is responsible for the development of creative marketing and sales programs to promote business.

[The beneficiary] also oversees the supply and distribution of the company's energy. He establishes relations with suppliers and distributors. As an Executive, [the beneficiary's] duties are to ensure that the company would be successful in establishing and maintaining a strong business presence in the United States. He is charged with using his business expertise to oversee the expansion of business interest. In the execution of the duties, he is empowered by the company to exercise wide latitude in all decision making and report only to himself as he is the sole owner of the company.

Finally, counsel further offered the following regarding the percentage of time spent on each duty:

As General Manager he executes the following executive duties: Specifically, approximately, 60% of the Beneficiary's time spends in the day-to-day operations which consist of directing the administration and infrastructure of the U.S. operation; formulating and setting all business policies and practices; managing the short and long term financial planning and investments; establishing relationships with retail stores, galleries and specialty toy stores and general public; planning promotional campaigns; preparing marketing meetings with potential buyers; conducting all financial operations; and monitoring all expenditures, supplies and distributions. More specifically, of that 60%, the petitioner estimates about 20% is devoted to the development of creative marketing and sales programs to promote business, 30% is devoted on the review of inventory and sales, and the remaining 20% is devoted to billing, invoicing, tracking of shipments, insurance matters and reviewing of orders. The Beneficiary also spends a fair portion of his time in reviewing current practices, implementing new procedures and policies of its structure to improve the cost effectiveness and efficiency of the company's operations and contribute to the business development and success of the enterprise.

The remaining 40% of the Beneficiary's time, outside of the 60% is devoted in marketing research activities to establish and maintain a strong business presence in the United States. He identifies and ensures the development of new distribution opportunities; supervises organizational and business development for the logistical operations; oversees client and public relations; negotiates, finalizes and signs contracts; analyzes cost and determines profit margins; tracks incoming funds and receivables; consents to hire and terminate employees. The beneficiary dedicates time to resolve legal affairs and obtains all licenses and permits.

Rather than providing the petitioner's organizational chart, the petitioner provided an undated list of five employees listing the beneficiary at the top as the General Manager. On the list, the petitioner named a property leasing manager, financial manager, product manager and a utility manager. Brief duties for each position were listed on subsequent pages. Education requirements were not provided for any of the positions. No additional employees were noted.

The petitioner provided a Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2011 which reflected only three employees receiving pay during that period. According to the petitioner's general ledger dated November 2011, and its submitted payroll records, it appears the employees at the time of filing were the beneficiary, the product manager and the financial manager, who was paid \$520 for 20 hours of work during the first quarter of 2011. Based on the evidence submitted, the utility manager was paid in June 2011 and November 2011 only, and the property leasing manager was paid for the first time in November 2011.

The product manager's duties are listed as:

- Search for products intended for export to the EU via the Internet
- Product surveys of retail outlets
- Market research imports for its own products
- Assistant of General Manager
- Building of customer relationship

The financial manager's duties are listed as:

- Accountant
- Check-in purchase prices
- Billing
- Preparation of financial statements and tax returns
- Check payments
- Financial controlling
- Payroll

The director denied the petition on March 2, 2012. The director determined the petitioner did not establish the beneficiary would be employed in a primarily managerial or executive capacity. The director concluded that the nature and size of the company did not appear to warrant the position for which the beneficiary was to be employed. Further, the director found that while some of the duties were managerial or executive in nature, other duties were closer to that of an accountant, a marketing agent or a sales representative. The director further found that the evidence was insufficient to establish that the beneficiary would supervise a subordinate staff comprised of managers, supervisors or professionals.

On appeal, counsel asserts that the issue of whether the beneficiary is acting primarily in an executive capacity was already resolved by USCIS when it approved two previously filed L-1A classification nonimmigrant petitions filed on the beneficiary's behalf. Counsel also asserts that the petitioner's business "requires a high degree of sophistication and may not require extensive staffing in the U.S." Therefore, counsel requests that "[i]f staffing levels are to be used as a factor in determining whether an individual is acting in an executive capacity, the reasonable needs of the organization in light of the overall purpose of said organization shall be taken into account." Counsel cites several unpublished AAO opinions supporting her assertion that prior petitions were approved because the multi-national executive was involved in very specialized

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business functions. However, counsel does not provide any examples or explanation as to what extensive knowledge and unique skills are required of the beneficiary in this position in order to support her claim that the beneficiary is performing a specialized business function.

Upon review, counsel's assertions are not persuasive. 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. § 204.5(j)(5). Initially, the petitioner provided a short and very vague description of the beneficiary's duties offering little insight into what tasks the beneficiary would be performing on a day-to-day basis on behalf of the petitioner's instrument imports/property management business. Furthermore, some of the duties described appeared to be non-qualifying such as being responsible for the day-to-day operations including inventory and sales; performing market research; and being responsible for regulation compliance, shipping options, and record keeping.

In response to the request for evidence, counsel for the petitioner offered an entirely new and expanded duty description which included a percentage of time allocated to different responsibilities. Nevertheless, the duties listed were still very broad and vague. For example, counsel asserted that the beneficiary would spend 21% of his time preparing, creating and modifying the company's measurable goals, strategic plans and operations and objectives and determining the methodology to assess whether the company is making suitable progress towards achieving those goals and objectives. Counsel failed to offer any specifics or details that would explain what actual tasks the beneficiary would perform. 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 failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

Further, in the same response for evidence, counsel offered an additional description of the beneficiary's duties which more closely resembled the description provided at the time of filing and suggested that the beneficiary will perform primarily non-qualifying duties. For example, counsel stated that the beneficiary allocates 40 percent of his time to marketing research activities, and spends the majority of his remaining time on creating marketing and sales programs, "review of inventory and sales," and "billing, invoicing, tracking of shipments, insurance matters and reviewing of orders." These duties bear little resemblance to the above-referenced position description contained in the very same letter. The AAO is not in a position to determine which of the varied position descriptions submitted most closely represents the beneficiary's actual duties. 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).

A review of these descriptions suggests that the beneficiary is seemingly responsible for every aspect of this business. For example, despite claiming to have a financial manager, the beneficiary is expected to determine ongoing funding and establish a budget, assess financial needs, analyze costs, determine profit margins, track incoming funding and receivables, complete billing and invoicing, and he has complete control over all financial operations. Based on the various conflicting position descriptions in the record, the AAO is unable to determine whether the claimed executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not credibly 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).

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and 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.

Despite claiming four employees at the time of filing and submitting a list of five company employees, the petitioner provided payroll and financial evidence for only two full-time employees (including the beneficiary) and one part-time employee at the time the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). At the time the petition was filed, the petitioner employed the beneficiary, a product manager and a part-time financial manager. The other two employees named in response to the RFE were both claimed to perform duties related to the petitioner's property management business. The petitioner has not claimed that the beneficiary performs any duties related to this component of the business, but has also not established who would have been available to relieve him from performing such duties at the time the petition was filed.

Furthermore, based on the documentation provided, it appears that the beneficiary was to be responsible for most aspects of marketing, sales, operations, and administration, all of which require the performance of non-qualifying duties. Specifically, the beneficiary was expected to engage in contracting, negotiations, establishing relationships with customers and buyers, and most of the company's business administration. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a

multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, counsel asserted that the petitioner engaged in a unique and specialized business but failed to provide any documentation or even an explanation to justify how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive 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'r 1998).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

In this matter, based on the various and broad based descriptions provided by the petitioner, and the petitioner's failure to corroborate its claimed staffing levels, the record reflects that it is more likely than not the beneficiary himself handled most of the day-to-day operations associated with the petitioner's musical instrument and property management business, and relied on his one full-time subordinate to provide assistance in carrying out his duties. The petitioner has not explained how one full-time employee and an intermittently employed part-time accountant/finance employee could reasonably relieve the beneficiary from primarily performing non-qualifying duties associated with the petitioner's business.

Counsel refers to several unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity despite the small size of the company or lack of staff. In this matter, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions.

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.

Counsel also cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS). In *National Hand Tool Corp.* the court emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is not primarily performing managerial or executive duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Additionally, in her brief, counsel cited the Foreign Affairs Manual (FAM) as an authority supporting the petitioner's argument. It must be noted that the FAM is not binding upon USCIS. See *Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N Dec. 125 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

It must also be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

Accordingly, the appeal will be dismissed, as the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, as required by section 203(b)(1)(C) of the Act.

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 had not met that burden.

ORDER: The appeal is dismissed