



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF D-I- CORP.

DATE: SEPT. 14, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an exporter of luxury automobiles, seeks to permanently employ the Beneficiary as its president under the immigrant classification of a multinational executive or manager. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Texas Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary will be employed in the United States in a managerial or executive capacity.

The matter is now before us on appeal. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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 the alien 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.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

(3) Initial evidence—

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

II. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The Director denied the petition based on a finding that the Petitioner had not established that the Beneficiary's position with the Petitioner qualifies as a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as "an assignment within an organization in which the employee primarily":

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as "an assignment within an organization in which the employee primarily":

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.¹

A. Evidence of Record

The Petitioner filed the Form I-140 petition on November 12, 2013, seeking to employ the Beneficiary as its president. At the time of filing, the Petitioner indicated that it had six U.S. employees.

The Petitioner's initial submission included a copy of the Petitioner's five-year business plan, with "a summary of the duties and responsibilities for the key employees." The plan indicated that the Beneficiary has the following duties and responsibilities:

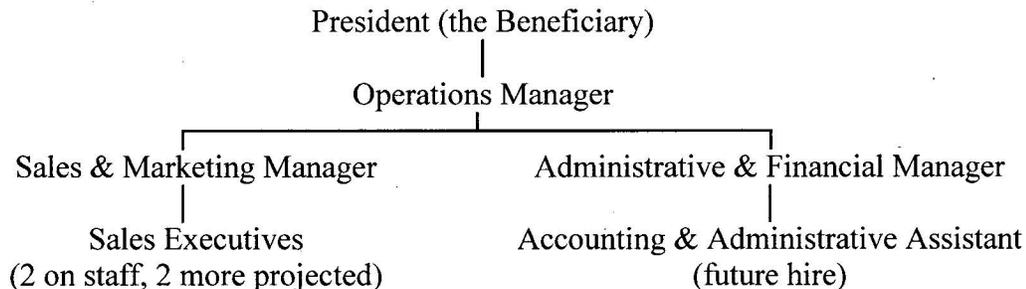
¹ See section 101(a)(44)(C) of the Act.

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1. Devise Developmental and expansion strategies for company according to reports and status of business operations;
2. Communication and conferring with foreign parent company, securing the supply chain and necessary capital for the U.S. company, reporting the performance of the US company; devising policies and policies [sic] in coordination with parent company;
3. Meeting with subordinate managers and personnel, listening to report, and making decision. Conducting impartial evaluations on employee performances. Devising training programs [for] company employees, and mak[ing] personnel decisions as needed;
4. Making decisions on business deals, reviewing major sales document[s], and signing agreements with outside parties on behalf of the company. Communicating and phone or in person conferences with major suppliers, business partners, and those parties company managers or sales representative[s] could not reach for non-routine conference;
5. Reviewing and reading sales and market reports, managing and overseeing the performances of all company personnel to ensure that business strategies are implemented;
6. Reviewing company financial records prepared and submitted by the accounting department. Overseeing the financial activities of the company and communicating with CPA or legal professional.

The Petitioner submitted an organizational chart showing the following company structure, including projected future employees:



The Director issued a request for evidence on June 24, 2014. The Director instructed the Petitioner to submit further information and documentation showing that the Beneficiary's intended work would conform to the statutory definition of a managerial or executive capacity.

In response, the Petitioner submitted an August 18, 2014 letter from its operating manager, [REDACTED] providing the following breakdown of the Beneficiary's duties:

- Setting up corporate policies, rules, financial budgets and goals . . . **(20% of her work time)**

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- Deciding the entire company's business development, expansion strategies and implementation; **(15% of her work time)**
- Managing and liaising with foreign parent company in securing demand & supply chains and necessary capitals [*sic*] for the U.S. business operations, and reporting the work performance to, and receiving operating instructions from the Board of Directors; **(10%)**
- Meeting regularly with departmental managers . . . ; **(10%)**
- Conducting annual review and evaluation on employee performance, and determining hires or dismissals, employee training, promotion and bonus; **(10%)**
- Dealing at the highest level with our suppliers and negotiating prices and fees; **(10%)**
- Managing major business deals, reviewing key sales accounts, and signing agreements on behalf of the company; **(10%)**
- Reviewing financial statements and overseeing the accounting activities; and **(10%)**
- Serving as a key signatory on all banking accounts and approving all major . . . transactions involving the company. **(5%)**

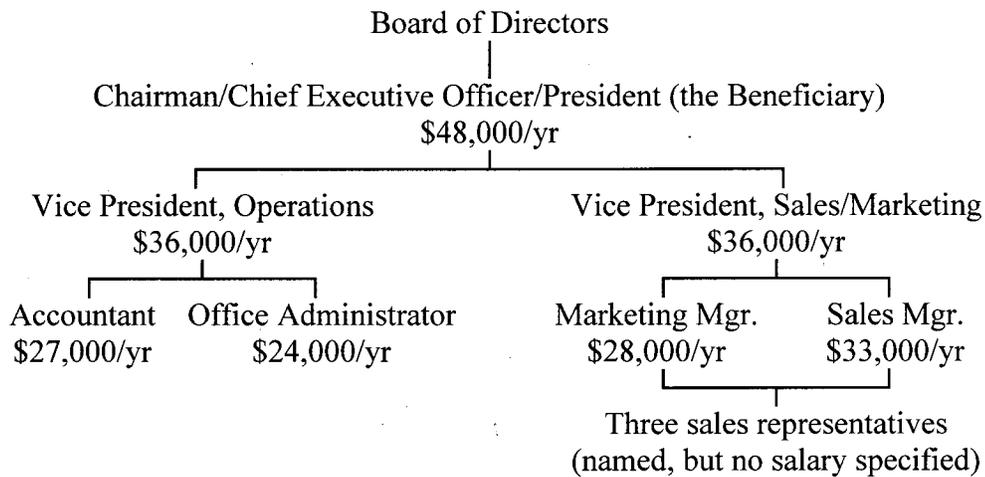
A new organizational chart indicated that the Petitioner had not yet hired an accounting and administrative assistant, indicating that the operational duties of that position must have rested with one or more existing employees. The chart also identified a "Marketing Director" in place of the previously described "Sales & Marketing Manager."

Copies of IRS Forms W-2, Wage and Tax Statements, showed that the Petitioner paid each of the Beneficiary's subordinates between \$2250 and \$31,500 during 2013.

The Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States. In the denial notice, the Director stated: "In reviewing the W-2 forms, it appears that the beneficiary supervises part-time employees . . . and it appears that the beneficiary's subordinates have received less than that of a full-time professional wage." Given this information and the small size of the Petitioner's staff, the Director concluded that the Petitioner had not established that the Beneficiary's position comprised primarily executive or managerial functions.

On appeal, the Petitioner notes that USCIS had previously approved a nonimmigrant petition, and an extension, to grant the Beneficiary status as an L-1A nonimmigrant intracompany transferee executive or manager. The Petitioner asserts that "the Beneficiary became the Chairman of the Board and Chief Executive Officer (CEO) of [the petitioning company] in October 2014," and that the Petitioner has "clearly shown that the [Beneficiary's] primary job duties . . . undoubtedly fall into the managerial capacity."

Further, the Petitioner submits a new organizational chart, highlighted below:



B. Analysis

Upon review, and for the reasons stated below, we find that the Petitioner did not establish that the Beneficiary's proposed position with the petitioning entity meets the requirements of a managerial or executive capacity.

The Petitioner contends that "multiple approvals of the L-1A petitions and L-1A extensions filed in this case should be given *great deference* as provided in the *Changes to the L Nonimmigrant Classification made by the L-1 Reform Act of 2004*, Memo (July 28, 2005)." The cited memorandum reads, in pertinent part: "In matters relating to an extension of nonimmigrant petition validity involving the same parties (petitioner and beneficiary) and the same underlying facts, a prior [approval] should be given deference." We note that the present petition does not seek "an extension of nonimmigrant petition validity," but a new, immigrant classification.

In making a determination of statutory eligibility, USCIS is limited to the information contained in the individual record of proceeding for the specific petition under review.² The approval of prior petitions and extensions, possibly by mistake or oversight, does not create an automatic entitlement to the approval of subsequent petitions.³

There is no dispute that the Beneficiary is the highest ranking official at the petitioning company, but this is not sufficient by itself. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily*

² See 8 C.F.R. § 103.2(b)(16)(ii).

³ See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir. 2007); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm'r 1988).

(b)(6)

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performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions.⁴ The Petitioner has provided insufficient details or explanation of the Beneficiary's activities in the course of her daily routine. For example, the list of duties indicates that the Beneficiary spends the majority of her time "[s]etting up corporate policies," "[d]eciding the entire company's business development," "managing and liaising with the foreign parent company," and "meeting regularly with departmental managers." These general descriptions do not show what, exactly, these duties entail. Furthermore, the Petitioner listed "[d]ealing . . . with . . . suppliers and negotiating prices and fees" and "[m]anaging major business deals" as separate functions, but the terms appear to describe the same basic activity.

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.⁵ 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 actual duties themselves will reveal the true nature of the employment.⁶

The Petitioner observes, correctly, that the size of the petitioning entity should not be the sole factor in denying the petition. It is, however, one of several factors that USCIS can take into account. The assertion that the Beneficiary devotes 10% of her time to personnel matters does not appear to be realistic, given the small size of the company's staff. When [REDACTED] provided the percentage breakdown, he indicated that the company "has currently hired six (6) employees," one of whom was the Beneficiary. Even with some turnover (the record names three different operations managers), it is not evident that hiring and training would consistently occupy several hours of the Beneficiary's typical work week.

Documents submitted on appeal show that the Beneficiary became the Petitioner's chairman of the board and CEO in October 2014. The Petitioner acknowledges that the Beneficiary's actual duties have not changed. A change of title with no corresponding change in duties does not affect the Beneficiary's underlying eligibility. Furthermore, this development occurred nearly a year after the petition's November 2013 filing date, and therefore, even with a change of duties, it would not have been relevant to the Beneficiary's eligibility as of the filing date. The petitioner must establish eligibility for the requested benefit at the time of filing the benefit request.⁷

Although the beneficiary is not required to supervise personnel, if the petitioner claims that the beneficiary's duties involve supervising employees, then the petitioner must establish that the subordinate employees are supervisory, professional, or managerial.⁸

⁴ *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

⁵ *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).

⁶ *Id.*

⁷ See 8 C.F.R. § 103.2(b)(1); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

⁸ See section 101(a)(44)(A)(ii) of the Act.

The Petitioner submitted two completely different organizational charts detailing the structure of the U.S. entity. In the initial filing, a sales and marketing manager and an administrative and finance manager report to the operations manager, who in turn reports to the Beneficiary. In the organizational chart submitted on appeal, a vice president of operations and a vice president sales and marketing report to the Beneficiary, who in turn reports to a Board of Directors. It is impossible to determine whether the Beneficiary's subordinates will sufficiently relieve her from performing administrative and operational tasks because the Petitioner has not consistently demonstrated which positions will support the Beneficiary in her role as president. As previously noted, the Petitioner must establish eligibility for the requested benefit at the time of filing the petition. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements.⁹

Here, the Petitioner's primary assertion is that the Beneficiary supervises professional employees, citing evidence that several of her subordinates hold bachelor's degrees in a variety of fields. Counsel, in the appellate brief, states that the two vice presidents "are full-time degreed professionals." The Petitioner submitted no evidence to support this claim, and the unsupported assertions of counsel do not constitute evidence.¹⁰ In evaluating whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. The Petitioner has not submitted any evidence demonstrating that the Beneficiary's claimed subordinates possess degrees, or that their positions require degrees.

We also note that the Petitioner has not established that the Beneficiary's subordinates will act in supervisory or managerial capacities. For example, according to the Petitioner's organizational chart included in its business plan and submitted with the initial filing, the Beneficiary directly supervises one subordinate employee, the operations manager, who in turn oversees two subordinate employees with managerial titles: the sales and marketing manager and the administrative and finance manager.

The operations manager's job description reads as follows:

1. Draft and implement specific steps and procedures to implement President's directives;

⁹ See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). See also 8 C.F.R. § 103.2(b)(1).

¹⁰ See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

2. Oversee and ensure performances of the sales department; Confer with Sales Director, and oversee Financial and Administrative Manager;
3. Maintain Relationships with existing clients and explore sales opportunities with new clients;
4. Coordinate with and assist President to implement company strategies and policies;
5. Oversee the distribution of products and company resources;
6. Maintain quality control of company services and ensure customer service is provided.

The above job description lists few specific, identifiable tasks, and item 4 appears to be a rewording of item 1. Maintaining relationships with existing clients and exploring sales opportunities with new clients appear to be the tasks of a sales person rather than a manager or supervisor. Further, while one of the operations manager's tasks involves overseeing the sales department, we note that the sales and marketing manager earned \$2700 more than the operations manager in 2013, which casts doubt on whether these positions have a true supervisor or manager and subordinate relationship. Further, the sales and marketing manager's duties include "providing customer support" and "maintaining good business relationships with clients." These types of tasks are typically delegated to subordinate employees such as sales personnel, thereby raising questions with regard to the extent, if any, of this employee's managerial or supervisory power.

We also note that the administrative and financial manager earned \$13,500 in 2013, which causes us to question how much time the operations manager could have spent supervising someone who either worked on a part time basis or for part of the year. Moreover, the duties of the operations manager's other claimed subordinate employee, the administrative and finance manager, include answering incoming phone calls, managing faxes, and keeping the company office "well supplied." It appears that this employee is exclusively responsible for all of the Petitioner's administrative and clerical tasks.

In the present matter, the Petitioner has not provided evidence of an organizational structure sufficient to elevate the Beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Despite her claimed supervision of an operations manager, who appears to supervise two subordinate managers, the descriptions of the duties associated with all three of these positions indicate that they are all performing low-level functions essential to the production of the petitioner's products and services. The Petitioner has not shown that the Beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The Petitioner has not established, in the alternative, that the Beneficiary would be employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization.¹¹ The statute and

¹¹ See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii).

regulations do not define the term “essential function.” If a petitioner claims that the beneficiary is managing an essential function, the petitioner must clearly describe the duties to be 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.¹² In addition, a 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.

In the instant matter, the Petitioner has not articulated a specific function that the Beneficiary would manage or provided evidence to demonstrate that the Beneficiary will primarily perform managerial duties related to a specific function. As noted, the Beneficiary’s job duties are vague and do not provide a clear understanding of her claimed managerial duties. The Beneficiary is not required to directly supervise subordinate staff if she manages an essential function of the U.S. company, but the Petitioner must nevertheless establish that someone other than the Beneficiary will be performing the day-to-day operational tasks inherent to the Petitioner’s business. Here, the Petitioner has not provided consistent information regarding the organizational structure of the U.S. entity. Therefore, the Petitioner has not established that it will employ the Beneficiary in a managerial capacity, specifically as a function manager.

The statutory definition of the term “executive capacity” focuses on a person’s elevated position within an organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization.¹³ 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, a given 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.”¹⁴ While the definition of “executive capacity” does not require a petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, we note again that it is the petitioner’s burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

The Petitioner has not provided evidence to demonstrate that the Beneficiary’s proposed duties in the United States will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The job duties provided for the Beneficiary’s proposed position in the United States do not demonstrate that the Beneficiary will focus the majority of her time on executive duties rather than the day-to-day operations of the business.

¹² See 8 C.F.R. § 214.2(l)(3)(ii).

¹³ Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

¹⁴ *Id.*

Additionally, the Petitioner did not demonstrate that there will be other employees at the U.S. company to relieve the Beneficiary from performing the day-to-day routine operational and administrative tasks of the business, so that she can focus on directing the management of the organization and establishing the goals and policies of the organization. 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 petition for classification as a multinational manager or executive.¹⁵ However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as 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.¹⁶ 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.¹⁷

The Petitioner is doing business as an exporter of luxury automobiles, but the record does not support a finding that the Beneficiary would be relieved from performing day-to-day routine tasks associated with operating the business. The Petitioner has not shown how its staff would relieve the Beneficiary from significant involvement in its day-to-day operations.

Accordingly, we find that the Petitioner did not provide reliable, consistent evidence sufficient to establish that the Petitioner would employ the Beneficiary in a qualifying managerial or executive capacity. For this reason, USCIS cannot approve this petition.

III. CONCLUSION

We will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of D-I- Corp.*, ID# 98386 (AAO Sept. 14, 2016)

¹⁵ See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C).

¹⁶ 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).

¹⁷ See *Systronics*, 153 F. Supp. 2d at 15.