

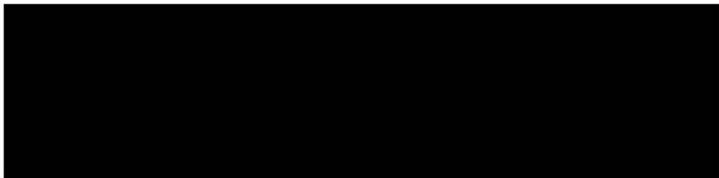


U.S. Citizenship
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File: EAC 08 119 51776 Office: VERMONT SERVICE CENTER

Date: OCT 10 2008

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as its general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a corporation organized in the State of Florida, claims to be a Mediterranean restaurant operating under the name of Ali Baba Grill Café. The petitioner claims that it is the subsidiary of Akkan Construction, Ltd., located in Adana, Turkey. The beneficiary was granted three years in L-1A classification and the petitioner seeks to extend the beneficiary's stay for three additional years.

On July 3, 2008, the director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. On appeal, counsel contends that the director's decision was incorrect based on the evidence of record, and claims that the director erred by finding that the beneficiary was not employed in a primarily managerial or executive capacity.

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

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

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

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

The issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

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

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

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

The request for extension, filed on Form I-129 on March 20, 2008, indicated that the petitioner currently employed 8 persons. In a letter from the petitioner dated March 17, 2008, the beneficiary, in his capacity as general manager, claims as follows:

As a General Manager I oversee entire operations of the restaurant, supervise and control the work of professional employees, hire, train and oversee staff, fire staff and have discretion over day-to-day operations, determine what equipment must be changed, analyze restaurant menu and eliminate or change the unpopular items, oversee food preparation.

My business plan includes inside repairs, outside construction and renovation, to increase seating capacity from 80 seats to 130 and to add Turkish menu items, since the current menu offers mostly Greek cuisine. As the result of these changes, I plan to increase staff by four people.

The petitioner also submitted a document entitled "Business Plan," which stated:

[The petitioner] has been functioning as a grill-café since 2000 and was profitable ever since.

Currently, the restaurant has two shifts, one general manager, an operations manager, a superintendent, a chef cook, two cook assistants, a waitress and an accountant. During the recent shareholders' meeting it was decided that the only way to increase profitability is to make inside repairs, outside construction and renovation, to increase seating capacity from 80 seats to 130 (by adding adjacent premises) and to add Turkish menu items, since the current menu offers mostly Greek cuisine. As the result of these changes, the owners are planning to increase staff by about four people.

* * *

[The petitioner] has a team of 8 employees. [The beneficiary] is the General Manager. He also holds a corporate position of secretary. [The beneficiary] has extensive managerial experience. He oversees entire operations. The general manager is also responsible for all of the finance and accounting functions. [The beneficiary's] experience will be invaluable in keeping [the petitioner] on track and profitable. The General Manager will also supervise and direct the reconstruction project . . . which will increase seating capacity by 50 additional seats.

[The petitioner] has a Operations Manager – [REDACTED], a Superintendent – [REDACTED], a Chef Cook – [REDACTED], two assistants of chef cook [REDACTED] and [REDACTED], a waitress, [REDACTED], and an Accountant [REDACTED].

In order to achieve my business plan I am planning to hire four more employees within [three] years: one more cook, one assistant cook and two more waitresses as a result of our plan to expand business. My average team member has general experience in seated

restaurant and fast food. The educational and professional background of my employees is typical for people working in such level within the food service and sale industry in that each has general experience in fast food, graduation from high school, and the basic skills needed to be competent for those occupations. No specific or qualified credentials are required except for the Safety Food Hygiene Course completed by every employee.

My Chef is responsible for back end production of the venture. She is directing the activities of other kitchen workers, menu planning, recipe creation, food and supply ordering. Assistant cooks are responsible for day to day food preparation. Waitress is responsible for taking orders, serving food, clearing tables.

The petitioner also submitted an organizational chart, which showed that the beneficiary was at the top of the petitioner's organizational hierarchy. It demonstrated that the beneficiary directly oversaw [REDACTED] Operations Manager, who in turn oversaw [REDACTED], Superintendent, who in turn supervised the remaining five employees.

On April 25, 2008, the director requested additional evidence. Specifically, the director requested additional evidence to establish that the beneficiary will be employed in a managerial or executive capacity, including but not limited to: a more detailed description of the beneficiary's duties and the percentage of time he spent on such duties; the number of subordinate employees he supervised as well as information regarding their positions; and an explanation regarding who provides the product sales and services for the company. The director also requested copies of the petitioner's Employer's Quarterly Tax Returns for all four quarters of 2007, in addition to all W-2, 1099, W-3 and 1096 forms issued by the petitioner in 2007.

In a letter dated May 29, 2008, counsel for the petitioner submitted the following updated overview of the beneficiary's duties:

Responsible for the sustained success, growth, and overall asset management of the restaurant as measured by total revenue and net income. He is accountable for all aspects of front and back-of-house activities including:

- Administrative functions, hire, fire, train and oversee staff
- General management of the restaurant staff and direct supervision of professional employees: operations manager and head cook[]
- Approve/determine the necessity of new main equipment
- Approve/determine the necessity of new menu or elimination of unpopular menu items

He is responsible to meet or exceed each customer's expectation of [the petitioner's] experience by maintaining the highest standards of food and beverage quality, exceptional value and superior services. General Manager sets up strategy and vision, approve business plan, budget goals, analyze market situation, financial and economic news, meets with local

authorities, lawyers, CPAs regarding main issues that arise if his involvement is necessary and those issues cannot be resolved by his subordinates. He reports to the Board of Directors on a quarterly basis.

Monday – Friday (40 hours):

Analyzing financial results for the previous week, management issues, financial needs, review of different proposals from Operations Manager and a Head Cook (3 hours).

Direct supervision of professional staff, by checking decisions made, giving directions, correcting decisions made by subordinates if needed (20 hours).

Checking and analyzing main financial figures, approving budget (2 hours).

Checking if the business is developing within the strategy and vision set (1 hours).

Overview of a business plan. Correcting business strategy/operations based on general financial and economic situation (0.5 hour).

Overview market situation in general and on local level (0.5 hour).

Overview of restaurant operations for the previous week, based on Operations Manager's report. Comparing it with what was planned (2 hours).

Making decisions/corrections based on general economic situation (1.5 hour).

Checking with the company's budget. Addressing financial needs. Approving of proposals to the Board of Directors if needed. (1 hour).

Checking with Operation Manager regarding human resources needs, business culture issues, safety regulations, sales, advertising. (2 hours).

Building company's culture. Correcting business strategy, plans if needed (1 hour).

Overview of Operations Manager's and Head Cook's tasks/reports for the current week (0.5 hour).

Making some prognosis for the near future. Making decisions (2 hours).

Meeting with local authorities, attorneys etc. on as a needed basis. (1 hours).

Solving various other issues (2 hours).

In addition to a brief overview of the positions of the other employees, the petitioner also indicated that the operations manager had a bachelor's degree, and the remaining employees all had a high school diploma. No documentation in support of these contentions was submitted. It is further noted that the overview of employee positions lists six subordinate employees to the beneficiary, in contrast to the seven employees named in the original letter of support. It is further noted that [REDACTED] and [REDACTED] the chef assistants, [REDACTED], the waitress, and [REDACTED], the accountant, have been replaced by [REDACTED], assistant chef; [REDACTED], waitress; and [REDACTED] accountant. There is no person named in the second position of assistant chef claimed in the initial petition.

The petitioner also submitted copies of its Form UCT-6, Employer's Quarterly Report for the State of Florida, for the quarters ending September 30, 2007 and December 31, 2007. These documents indicated that for the quarter ending September 30, 2007, the petitioner paid \$12,865 in total wages and employed three persons: the beneficiary; [REDACTED], Chef Cook; and [REDACTED], an employee not previously identified in the petitioner's staff lists or organizational chart. For the quarter ending December 31, 2007, the petitioner paid \$5,500 in total wages and employed only the beneficiary and [REDACTED], Chef Cook.

The petitioner also submitted copies of Form 941, Employer's Quarterly Federal Tax Return, for the quarters ending September 30, 2007 and December 31, 2007. Form 941 for the quarter ending September 30, 2007 indicates that the petitioner paid \$11,065 in total wages to three employees, in contrast to the statements on the petitioner's Form UTC-6 for the same quarter, which indicates total wages in the amount of \$12,865. Similarly, the petitioner's Form 941 for the quarter ending December 31, 2007 indicates that the petitioner paid \$4,000 in total wages to three employees, in contrast to the statements on the petitioner's Form UTC-6 for the same quarter, which indicates total wages in the amount of \$5,500 to two employees.¹

The petitioner also submitted copies of its Form W-2, Wage and Tax Statement, for 2007 for the beneficiary, the Chef Cook, and [REDACTED], the employee not previously identified in any discussion of the petitioner's staff. Payroll records for the period ending March 31, 2007 indicates that the waitress, [REDACTED], worked 10 hours during this period; however, the record does not contain a Form W-2 for her for 2007. Moreover, the petitioner failed to submit evidence of the employment of any other persons for 2007.

¹ It is further noted that the petitioner also submits copies of its Form 941s for the third and fourth quarters of 2008, which appears to be erroneous since the response to the request for evidence was received on May 29, 2008, prior to the ending of the second quarter of 2008. It is noted that the amounts listed as wages paid for these periods corresponds to the wages claimed on the UTC-6 forms for the third and fourth quarters of 2007. Nevertheless, the submission of future documents for time periods that have yet to occur raises questions with regard to the veracity of the petitioner's other evidentiary submissions. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On July 3, 2008, the director denied the petition, finding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. Specifically, the director found that the beneficiary was not supervising professional employees, and appears to be engaged in many of the day-to-day tasks of the business despite his title as general manager. The director specifically focused on the contradictions contained in the employment records of the petitioner in comparison with its claimed staffing. On appeal, counsel contends that the beneficiary operated in a qualifying capacity by overseeing a staff and producing gross sales in the amount of \$358,514 for 2006 and \$281,684 in 2007. Counsel concludes by claiming that the petitioner has satisfied its burden by a preponderance of the evidence.

Upon review, the AAO concurs with the director's findings.

Despite the petitioner's contentions that the beneficiary functioned in a qualifying position, the information submitted with regard to the beneficiary's position, coupled with the inconsistent employment records and contradictory claims with regard to staffing, suggests that the beneficiary performs most of the day-to-day duties required to operate the company, and thus could he not be considered primarily a manager or executive. The AAO will begin by examining the duties of the beneficiary.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). 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 performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In this matter, the petitioner provided a generic description of the beneficiary's duties with the initial petition. In the request for evidence, the director asked the petitioner to submit more detailed evidence outlining the duties delegated to the beneficiary and, in response the petitioner submitted a description of duties along with the amount of hours he would devote to each task. The petitioner, however, failed to submit a specific overview of the beneficiary's duties that would clarify his role with regard to the deficiencies in staffing. Consequently, the description of duties on record, although it does provide a percentage breakdown, fails to specifically state the exact nature of the beneficiary's duties. More importantly, the petitioner fails to articulate the exact nature of the beneficiary's position with regard to the other staff members and the manner in which they interact. For example, the petitioner claims that the beneficiary is the general manager and the highest authority in the company, yet the description of duties is essentially a laundry list of non-specific tasks such as "checking if the business is developing within the strategy and vision set supervising subordinate employees," "building company's culture," and "solving various other issues."

Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In this matter, the recitation of the beneficiary's duties includes an abundance of tasks with no specific outline to clarify to what extent the beneficiary is engaged in each task. For example, "building company's culture" is too vague to allow the AAO to determine the exact nature of the beneficiary's role in the company. The director afforded the petitioner an opportunity to supplement the record with a more specific description of the beneficiary's duties yet the petitioner failed and/or refused to do so. As a result, the AAO cannot determine the exact nature of the beneficiary's duties in the context of the petitioner's stated business or determine whether his duties are primarily managerial or executive in nature.

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Because a number of the tasks listed in the recitation of duties include tasks traditionally not considered to be primarily managerial or executive, it is impossible to determine that the beneficiary functions primarily as manager or executive of the company. For example, the petitioner claims that the beneficiary is responsible for "approv[ing]/determine[ing] the necessity of new menu or elimination of unpopular menu items." Generally, a task such as this would appear to be marketing-related and thus non-qualifying; however, the petitioner provides no detail regard the extent of the beneficiary's involvement in these tasks. Instead, the petitioner merely concludes that the beneficiary is "the highest authority within the organization" and therefore is primarily a manger or executive. This claim, however, will not suffice. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Merely claiming that the beneficiary is operating in a qualifying capacity is insufficient for purposes of this analysis.

More important, however, are the discrepancies in the record with regard to the staffing of the petitioner's operation. The petitioner claims that 20 hours of the beneficiary's work week is dedicated to the "direct supervision of professional staff, by checking decisions made, giving directions, correcting decisions made by subordinates." Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of its chef, its kitchen staff, its waitress and other supporting staff members. Although the

petitioner claimed that the operations manager possessed a bachelor's degree and the remainder of the staff possessed high school diplomas, the petitioner provided no documentation to support these claims. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Moreover, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating whether the beneficiary manages professional employees, the AAO 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." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). It is generally presumed that staff at a restaurant would not require a baccalaureate degree as a prerequisite for employment. The position of operations manager, however, if truly a professional position, may in fact require additional education; however, the petitioner failed to address this request for information by the director so the requirements for this position cannot be determined based on the current record.

Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals. While the petitioner does contend that the operations manager supervises subordinate staff members (i.e., the kitchen staff), the failure to document the actual employment of the operations manager renders it impossible to conclude that the beneficiary is able to solely supervise employees who relieve him from engaging in non-qualifying tasks. Thus, in addition to failing to demonstrate the actual employment of its alleged staff of eight persons, the petitioner has likewise failed to demonstrate that the beneficiary's subordinate employees would be supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

In the absence of such evidence as pay stubs and payroll records, the petitioner has not established that the petitioner employs a subordinate staff that would relieve the beneficiary from performing non-qualifying duties. Although the petitioner submits evidence that it employed [REDACTED], identified as the Chef, and [REDACTED], a person not specifically identified by name or position on the organizational chart or staff overview, this evidence contradicts the petitioner's repeated claims that it employed a staff of eight persons to operate the restaurant. 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 critical analysis of the nature of the petitioner's business, based on the absence of employment records, undermines counsel's assertion that the petitioner has subordinate employees to relieve the beneficiary

from performing non-qualifying duties. Rather, it appears from the record that the only individuals performing any restaurant-related functions are the beneficiary and the chef. As the chef clearly prepares the food, and the record identifies no waitress, no cashier, and no kitchen assistants as being on the payroll, it is reasonable to assume, and has not been proven otherwise, that the beneficiary is performing all other day-to-day functions, including waiting on tables, operating the cash register, cleaning dishes and cleaning the restaurant, etc. Since the petitioner contends that it is currently able to seated 80 persons, it is unlikely that the restaurant can be operational without the direct participation of the beneficiary in service-related functions. Based on the record of proceeding, therefore, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

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

ORDER: The appeal is dismissed.