



U.S. Citizenship  
and Immigration  
Services

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DATE: **DEC 17 2012**

Office: VERMONT SERVICE CENTER

FILE: 

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 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 Florida corporation, states that it operates an import/export business. It claims to be a subsidiary of Suplidora Industrial Ordaz, C.A., located in Venezuela. The beneficiary was previously granted one year in L-1A status in order to open or be employed in a new office in the United States as the petitioner's general operations manager. The petitioner now seeks to extend her status for a period of two years.

The director denied the petition concluding that the petitioner failed to establish: (1) that the foreign entity employed the beneficiary in a primarily managerial or executive capacity; and (2) that the U.S. company is doing business. The director also noted an inconsistency in the record pertaining to the petitioner's staffing levels as of the date of filing.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that it submitted ample evidence of the beneficiary's managerial role in the U.S. company and the petitioner's business operations in support of the initial petition and in response to the director's request for additional evidence. The petitioner asserts that the director overlooked critical evidence and erroneously penalized the petitioner for expanding its staffing while the petition was pending. The petitioner submits a brief and additional evidence in support of the appeal.

## I. THE LAW

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

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

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

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

## II. THE ISSUES ON APPEAL

### A. Employment Capacity Prior to Transfer

The first issue to be addressed is whether the petitioner established that the foreign entity employed the beneficiary in a primarily managerial or executive capacity prior to her transfer to the United States.

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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 20, 2011. The petitioner's initial evidence did not include the beneficiary's job title or job duties pertaining to her period of employment with the foreign entity. In a letter submitted in support of the petition, the petitioner noted that the beneficiary was transferred to the United States in June 2010 "based on her critical experience acquired through having managed and support functions as well as her acumen and managerial skill demonstrated during her tenure with our headquarters in Venezuela."

The petitioner submitted an organizational chart illustrating the foreign entity's staffing as of 2010. The chart included a total of seven employees, but did not clearly depict the hierarchy among the staff. The company's legal advisor is depicted at the top of the structure. On one side of the chart, the petitioner listed a general manager, a sales supervisor, and an operations manager. On the other side of the chart, the petitioner listed a sales representative, an accountant and an administrative manager. The beneficiary was identified as the administrative manager with no apparent subordinates.

On June 30, 2011, the director instructed the petitioner to submit evidence that the beneficiary was employed in a managerial capacity by the foreign entity, and specifically requested that the petitioner provide the names and position descriptions of the beneficiary's subordinates within the foreign entity, and their educational credentials. In response to the request for evidence, the petitioner resubmitted the same organizational chart provided at the time of filing.

The director denied the petition on September 1, 2011, concluding that the petitioner failed to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity prior to her transfer to the United States. In denying the petition, the director emphasized that the petitioner failed to submit the requested position descriptions and educational credentials for the foreign entity's employees in support of its claim that the beneficiary was employed in a qualifying capacity abroad. The director further

found that, based on the submitted organizational chart, the beneficiary did not supervise any subordinate employees within the foreign entity. The director concluded that the petitioner did not demonstrate that the beneficiary was functioning at a senior level within the foreign organization's hierarchy other than in position title.

On appeal, the petitioner submits an organizational chart for the foreign entity claimed to show the structure of the company as of 2011. The chart includes a total of ten employees and identifies the beneficiary as the administrative manager, supervising a total of six subordinates, including an operations manager and a sales manager. Six of the ten employees did not appear on the previous organizational chart. The petitioner also submits a position description for each employee identified on the new organizational chart.

Upon review, the petitioner has not established that the foreign entity employed the beneficiary in a primarily managerial or executive capacity.

The petitioner's initial evidence included no information regarding the beneficiary's job title or job duties with the foreign entity, despite the fact that the Form I-129 specifically instructs the petitioner to provide a description of the beneficiary's duties abroad for the three years preceding his or her admission to the United States. The petitioner stated "please see letter" on the Form I-129 and then failed to provide this required information in its accompanying letter. Considered in light of the submitted organizational chart which showed no clear hierarchy among the foreign entity's seven employees, and no subordinates reporting to the beneficiary in her capacity as "administrative manager," the director reasonably exercised his discretion to request additional evidence pertaining to the beneficiary's previous position.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. 8 C.F.R. § 214.2(l)(3)(viii). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

The petitioner failed to submit the requested evidence in response to the RFE, and instead re-submitted the employee list and organizational chart that the director had already reviewed and found to be deficient to establish that the beneficiary was employed in a qualifying managerial or executive capacity abroad.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. The AAO concurs with the director's determination that the evidence submitted at the time of filing and in response to the RFE did not establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

The AAO further notes that the new evidence provided on appeal appears to describe the structure of the foreign entity as of 2011. Given that the beneficiary transferred to the United States in L-1A status in 2010,

the newly submitted evidence, even if the AAO were required to review it on appeal, would not be relevant to a determination as to whether the beneficiary was employed in a qualifying capacity during the three years preceding the filing of her initial L-1 petition in 2010. *See* 8 C.F.R. § 214.2(l)(3)(iii). Consequently, the appeal will be dismissed.

#### B. Doing Business in the United States

The second issue addressed by the director is whether the petitioner established that it has been doing business in the United States. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B).

The petitioner's initial evidence included copies of its IRS Forms 1120, U.S. Corporation Income Tax Return, for 2009 and 2010. The petitioner's 2010 tax return indicates that the company had gross receipts/sales of \$500,568. The petitioner also submitted copies of bank statements, business licenses and permits, invoices issued to the petitioning company for goods purchased, and invoices issued by the petitioning company to its customers for shipping and freight services provided.

In the request for evidence issued on June 30, 2011, the director instructed the petitioner to submit evidence of the type of business the petitioner is operating and evidence that it is conducting business. In response, the petitioner submitted color photographs of the petitioner's office and warehouse, local business tax receipts and registrations, and evidence of utility payments.

The director denied the petition concluding that the petitioner failed to establish the type of business the U.S. entity is operating, and because it "did not submit any invoicing to show that it was conducting business."

On appeal, the petitioner states: "We submitted sufficient evidence such as invoices you need to show that a business is operating, but also location, payroll, taxes, bank statements and license permits." The petitioner submits copies of invoices issued by the petitioning company between January and October 2011, evidence of purchases made by the petitioner, and additional copies of the company's tax returns and bank statements.

Upon review, the petitioner has submitted sufficient evidence to establish that it is doing business in the United States and the director's determination will be withdrawn with respect to this issue only. The petitioner's tax returns, invoices, licenses and permits submitted at the time of filing were sufficient to establish that the U.S. company is doing business, while the photographs submitted in response to the request for evidence depicted the actual location and operation of the entity. The director's request for additional evidence was non-specific with respect to the type of documentation required, and the AAO finds on review of the totality of the evidence that the petitioner established that the company is engaged in actively engaged in purchasing and shipping consumer products to Latin American customers.

#### C. Employment Capacity in the United States

A remaining issue in this matter is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director addressed deficiencies in the petitioner's evidence as it pertained to this eligibility requirement, but did not cite the beneficiary's employment capacity in the United States as a separate ground for denial. Upon review, the petitioner has not established that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition.

The petitioner stated on the Form I-129 that has six current employees and achieved gross annual income of approximately \$500,000 in the most recent fiscal year.

In a letter submitted in support of the petition, the petitioner described the beneficiary's duties as follows:

[The beneficiary] in her position as General Operations Manager coordinates activities of business or departments concerned with production, pricing, sales, or distribution of products. As applicant has directed a major component of the organization, established the goals of the component, has completed discretion in decision making, her past and future duties meet the requirements of executive capacity. [The beneficiary] is on the head of this company developing strategies for purchasing and marketing. Maintaining a staff with conducting the interview, hiring, and training process is also part of her duties along with preparing work schedules and assigning specific duties for the personnel.

The initial evidence included a "proposed organizational chart" for the petitioning company which depicts a total of nine positions. According to the chart, the organization is headed by a general manager, who supervises an administrative manager and an operations manager. The chart showed an accounts payable/receivable analyst and a bookkeeper reporting to the administrative manager, while the operations manager was depicted as supervising a sales coordinator, a purchase and logistics assistant, a USA sales person, and a sales person for Latin America. With the exception of the general manager, none of the employees were identified by name.

The petitioner also submitted a document titled "Job Descriptions" which includes position descriptions for each position identified on the organizational chart. This document described the position of "Operations Manager" as follows:

- Direct and coordinate activities of businesses or departments concerned with the pricing, sales or distribution of products.
- Manage staff, preparing work schedules and assigning specific duties.
- Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement.
- Establish and implement departmental policies, goals, objectives, and procedures, conferring with board members, organization officials, and staff members as necessary.
- Determine staffing requirements, and interview, hire and train new employees, or oversee those personnel processes.
- Monitor businesses and agencies to ensure that they efficiently and effectively provide needed services while staying within budgetary limits.
- Direct and coordinate the organization's financial and budget activities to fund operations, maximize investments, and increase efficiency.

The petitioner indicated that the sales coordinator reports to the "project manager" and is responsible for resolving customer complaints regarding sales and service, monitoring customer preferences, directing and coordinating activities involving sales of services, determining price schedules and discount rates, directing activities in sales and service accounting and record keeping and shipping/receiving operations, and

consulting with department heads to plan advertising services and "to secure information on equipment and customer specifications." The petitioner stated that the purchasing and logistics assistant: assists the operational manager with purchasing and logistics, negotiates contracts for purchases, is responsible for coordinating and tracking purchases, obtains purchases at the most favorable cost and terms, authorizes payment of purchases and supplies the billing department with client charges, and provides purchasing planning and control information.

The petitioner reported \$0 in salaries and wages on its submitted IRS Form 1120, U.S. Corporation Income Tax Return for 2010, but the tax return does reflect \$99,791 in "cost of labor." The petitioner submitted copies of IRS Forms 1099, Miscellaneous Income, issued to the following individuals in 2010: [REDACTED] (\$24,034); [REDACTED] (\$5,642); [REDACTED] (\$6,865); [REDACTED] (\$42,000); [REDACTED] (\$1,250); and [REDACTED] (\$20,000). The petitioner did not submit evidence of salaries, wages or other payments made to employees or contractors in 2011.

On June 30, 2011, the director issue a request for additional evidence (RFE), in which he instructed the petitioner to submit, inter alia, the following: (1) a comprehensive description of the beneficiary's duties and an explanation of how the duties will be managerial or executive in nature; (2) a complete position description for all U.S. employees, including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis and whether the positions require completion of a college education; and (3) an updated organizational chart including the names of all employees.

In response to the director's request for a comprehensive description of the beneficiary's duties and complete position descriptions for all employees of the U.S. company, the petitioner re-submitted the position descriptions provided at the time of filing. The petitioner submitted an organizational chart indicating the same structure as that indicated on the initial chart and identified all nine employees by name.

In response to the director's request that the petitioner submit a breakdown of the number of hours the employees' allocate to each of their job duties on a weekly basis, the petitioner stated that the beneficiary and each of her four claimed subordinates work eight (8) hours daily and forty hours weekly.

Upon review, the petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity.

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(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner initially submitted a very broad position description that provided little insight into what the beneficiary does on a day-to-day basis within the context of the petitioner's business. For example, the petitioner stated that the beneficiary will "direct and coordinate activities of businesses or departments concerned with the pricing, sale or distribution of products," "establish departmental policies, goals and objectives," "monitor businesses and agencies," and "direct and coordinate financial and budget policies." The petitioner failed to describe any specific duties the beneficiary would perform to carry out these broad responsibilities, some of which overlapped with responsibilities attributed to the company's general manager and administrative manager. 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).

After reviewing the petitioner's initial description, the director specifically requested a "comprehensive description" of the beneficiary's duties, as well as information regarding the number of hours she devotes to each of her job duties on a weekly basis. The petitioner responded by re-submitting exactly the same description it provided at the time of filing, and stating that the beneficiary would spend 40 hours per week on the listed job duties. 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).

While several of the duties vaguely described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. For example, the petitioner submitted dozens of invoices on appeal which identify the beneficiary as the company employee responsible for receiving customer orders, a non-managerial duty that is not included in the petitioner's description of her position. The beneficiary's apparent performance of these non-qualifying duties raises questions as to whether the petitioner fully and accurately described the beneficiary's scope of responsibility. 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 provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity. Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

As the instant petition requested an extension of a "new office" petition, the petitioner is required to submit statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees. See 8 C.F.R. § 214.2(l)(14)(ii)(D).

While the petitioner indicates that the beneficiary supervises four subordinate employees, the petitioner has not adequately documented its staffing as of the date the petition was filed in June 2011. The petitioner provided evidence that it paid the beneficiary's four claimed subordinates in 2010, but failed to document any payments to them in 2011. Further, only one of the four claimed subordinate employees (the sales coordinator) earned payments commensurate with full-time employment in 2010, while the beneficiary's remaining claimed subordinates received payments of only \$5,642, \$6,865 and \$1,250. As the petitioner has not corroborated its claimed organizational structure by submitting required evidence of wages, salaries or other payments to them as of the date of filing, the AAO cannot conclude that the beneficiary was supervising a subordinate staff comprised of managers, supervisors or professionals as of the date of filing, or whether she had staff to relieve her from performing non-qualifying duties associated with her area of responsibility. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.

*Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Based on the petitioner's failure to provide the requested detailed description of the beneficiary's duties and its failure to submit required initial evidence of wages paid to employees, the record does not support the petitioner's claim that the beneficiary would be employed in a primarily managerial or executive capacity. For this additional reason, the petition cannot be approved.

#### D. Qualifying Relationship

Beyond the decision of the director, a remaining issue is whether the petitioner established that it has a qualifying relationship with the foreign entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner stated on the Form I-129 that it is a wholly-owned subsidiary of Suplidora Industrial Ordaz, C.A. It submitted a copy of the company's Articles of Incorporation, which indicate that it is authorized to issue 1,000 shares of common stock. The petitioner also provided a copy of its stock certificate number "00" indicating that the company issued 510 shares of stock to the foreign entity on January 10, 2008. The petitioner failed to indicate any additional stock certificates to establish the ownership of the remaining shares, and thus did not support its claim that the foreign entity owns all issued shares.

In addition, the petitioner submitted copies of its IRS Forms 1120, U.S. Corporation Income Tax Return, for the 2009 and 2010 tax returns. At Schedule K, where asked to indicate whether any foreign person or corporation owns at least a 25% interest in the company's stock, the petitioner marked "no." This information is in direct contradiction to the petitioner's claim that it is wholly owned by a foreign company.

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). Accordingly, the petitioner has not adequately supported its claims that it maintains a parent-subsidiary relationship with the foreign entity. For this additional reason, the petition cannot be approved.

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

### III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.