

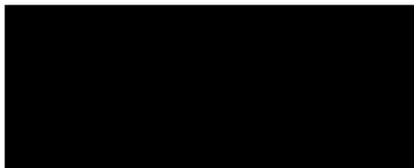
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
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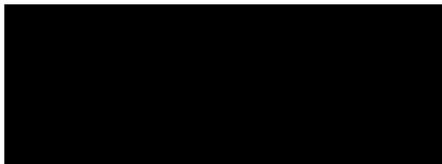
Petitioner:



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:



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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 to classify the beneficiary 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 software company, was incorporated in the Commonwealth of Massachusetts in 2008. It states that it is a subsidiary of [REDACTED] located in Switzerland. The beneficiary was initially granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his status so that he may serve in the position of president for two additional years.

The director denied the petition on March 24, 2010 based on a finding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's decision was based on the erroneous assumption that he would be managing professional employees. Counsel asserts that the regulations allow an L-1A visa holder to manage an essential function of the organization and contends that the beneficiary in this matter qualifies as a function manager.

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. Discussion

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. The AAO notes that the petitioner does not claim that the beneficiary will be employed in an 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.

A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 27, 2010. The petitioner stated that the beneficiary would continue to serve as president of the U.S. software company, which indicated that it has two employees.

In a letter dated January 13, 2010, the petitioner explained that its parent company, [REDACTED], develops and markets [REDACTED] for the simulation of electric systems, a product that is targeted at existing users of the Simulink commercial modeling tool and people engaged in the development of power electronics systems. The petitioner indicated that the company decided to open a sales office in the United States in 2008 after receiving disappointing results from U.S.-based resellers of the [REDACTED].

The petitioner went on to describe its activities in the previous year, noting that the company conducted training workshops at six U.S. universities between June and November 2009, and provided 33 in-house training sessions at high-tech companies and National Research Labs throughout the United States. The petitioner noted that these in-house training sessions began to result in significant sales beginning in October and November 2009. Finally, the petitioner indicated that it attended two trade shows in 2009.

The petitioner described the beneficiary's duties in the United States as follows:

As President for [the petitioner], [the beneficiary's] main responsibilities are to setup and grow [the company's] U.S. operations. [The beneficiary's] tasks include, but are not limited to: planning and developing the US sales organization; recruiting, managing and developing the local staff; identifying potential customers in the US; planning, marketing, advertising, and promotions; preparing and delivering product presentations, seminars, and workshops; planning and directing [the company's] activities to achieve agreed targets and standards for financial and sales performance, quality, culture and legislative adherence; maintaining and developing [the company's] culture, values and reputation in the U.S. market and with all of its staff, customers and partners; reporting to [REDACTED] in Switzerland; and acting as [the company's] U.S. representative in its dealing with the outside world.

The petitioner submitted a copy of its initial business plan dated July 2008. According to the business plan, the U.S. office team was to be comprised of: (1) the beneficiary, who was scheduled to be in the United States for up to two years to set up the company and to hire and train local staff; (2) Peter Baumann, who was to serve in the position of Assistant Sales & Marketing to support the U.S. operation for a period of three to six months for the purpose of contacting new customers, scheduling customer visits and arranging workshops and seminars; (3) a sales person who was to be in charge of direct sales; (4) an account manager who was to be appointed in 2010 and take over the beneficiary's duties in 2011; and (5) an application engineer who was to be hired in early 2011.

The director issued a request for additional evidence on February 1, 2010. The director requested that the petitioner provide a more detailed description of the beneficiary's duties and describe the typical managerial responsibilities he performs. The director further requested that the petitioner identify the number of subordinate supervisors the beneficiary manages, and instructed the petitioner to identify the proportion of the time the beneficiary allocates to managerial versus non-managerial functions.

In addition, the director requested evidence of the staffing of the U.S. company, including job descriptions for each employee and evidence of wages paid to employees during the first year of operations.

In a response dated March 12, 2010, the petitioner reiterated the position description provided in its previous letter. The petitioner added the following "specific managerial duties" to the beneficiary's job description:

- Rent office space
- Organize phone, fax and bank services
- Equip office
- Find, evaluate and appoint professional service providers, such as attorney, accountant, CPA
- Define legal framework for U.S. software sales
- Develop legal structure and draft intra-company contracts (with attorney)
- Develop tax strategies (with CPA)
- Prepare tax relevant documents (for accountant)
- Prepare documentation for visa application (for immigration lawyer)
- Recruit local personnel for the U.S. entity
- Instruct and supervise of sales personnel
- Develop and implement sales and marketing plans for U.S.
- Prepare sales documentation
- Negotiate with customers
- Arrange sponsorship agreements with universities
- Represent the company in conferences

The petitioner indicated that the beneficiary would hire a Sales Manager later in 2010 "to supervise all of the sales staff and eventually take over the responsibility for the entire U.S. operation, since the beneficiary will be returning to Switzerland in August."

The petitioner stated that the job duties of the employees the beneficiary supervises are to identify and contact sales leads, follow up on prospects, issue trial licenses and quotes, prepare workshops, trade shows and customer visits and to perform product presentations and customer visits.

Finally, the petitioner indicated that the beneficiary allocates 60 percent of his time to managerial and executive duties and spends the remainder of his time "holding workshops, attending trade shows, and visiting customers."

In response to the director's request for evidence of the staffing of the U.S. company, the petitioner indicated that Peter Baumann served in the position of Sales Engineer from April 2, 2009 until October 24, 2009 pursuant to an approved L-1B classification petition. The petitioner emphasized that while [REDACTED] returned to work for the foreign entity, "he continues to work on U.S. clients under the beneficiary's supervision." The petitioner stated that it was in the process of recruiting a local employee to fill the position of Customer Relationship Specialist and provided a copy of the job opening and resumes submitted by interested applicants. According to the submitted job description, the customer relationship specialist will initiate and maintain customer relationships, inform customers about new and updated products, issue trial licenses, set appointments with technical experts, organize workshops and seminars, follow up on sales and marketing activities, maintain and update a CRM database, and participate in marketing plan development.

The petitioner submitted copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, and IRS Forms W-2, Wage and Tax Statement for 2009. These documents indicate that the beneficiary was the only employee who received wages. The petitioner stated that Mr. Baumann remained on the foreign entity's payroll during his stay in the United States.

The director denied the petition on March 24, 2010, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director noted that the beneficiary was the company's sole employee at the time the petition was filed, and the petitioner's description of his duties suggested that he was still performing start-up functions that should have been accomplished during the first year of operations.

The director found insufficient evidence to establish that the beneficiary is primarily responsible for directing or managing a function within the organization, that he functions at a senior level within an organizational hierarchy, or that he would be responsible for the supervision and control of the work of subordinate supervisory, professional or managerial employees who would relieve him from performing the services of the company. The director noted that the petitioner already conceded that the beneficiary allocates 40 percent of his time to non-qualifying functions, and found that is reasonable to believe that he in fact allocates more than half of his time to such duties in light of the company's staffing structure at the time of filing the petition.

On appeal, counsel asserts that the director denied the petition "based on the assumption that [the beneficiary] as an L-1A manager would manage professional employees at his position in the U.S." Counsel states:

The reason the record does not sufficiently show that [the beneficiary] manages professional employees is that it is neither accurate based on the facts nor required based on the law. The record does show, however, that [the beneficiary] manages a function in the U.S. As the information submitted proves, [the beneficiary] qualifies as a Manager under 8 C.F.R. 214.2(l)(1)(ii)(B) in that he manages and will continue to manage an essential function within the organization; he functions and will continue to function at a senior level with respect to the function managed; and he exercises and will continue to exercise discretion over the day-to-day operations of the functions for which he has authority.

In response to the director's finding that the beneficiary's duties include tasks that should have been performed in the prior year, counsel emphasizes that the beneficiary did in fact have the office set up and running within one year, although counsel acknowledges that "the company's success in the U.S. did not develop until November 2009." Counsel notes that the beneficiary is in the process of finding an employee to manage the U.S. office as he intends to return to Switzerland in August 2010.

The petitioner provides evidence that it has filled the position of Customer Relationship Specialist as of April 2010, and asserts that the position is in fact a professional position, as it requires an employee who can communicate effectively with researchers and development engineers who use the petitioner's software. Nevertheless, counsel emphasizes that the beneficiary's position "was never intended to be a position that manages people."

Counsel reiterates the position description provided for the beneficiary at the time of filing. Counsel contends that "the actual selling of the product is performed via phone and email by the [redacted] [redacted], who continues to work on U.S. accounts from Switzerland, and by the newly hired Customer Service Specialist."

In response to the director's conclusion that the U.S. company "does not appear to require a bona fide manager or executive," counsel asserts that "to start, run and staff an entirely new office, one would have to be a manager or executive." Counsel states that the beneficiary came to the United States "to start and run the U.S. office until it was able to operate on its own."

Finally, counsel cites an unpublished AAO decision in support of the petitioner's claim that the beneficiary qualifies as a function manager.

B. Analysis

For the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial 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 definitions of executive and managerial capacity each 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 show 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). While the AAO does not doubt that the beneficiary exercises the appropriate level of authority over the petitioner's business, the totality of the evidence submitted does not demonstrate that the beneficiary's actual duties will be primarily managerial in nature.

The petitioner acknowledged that the beneficiary spends approximately 40 percent of his time holding workshops, attending trade shows and visiting customers, duties which the petitioner itself does not classify as qualifying managerial duties. The petitioner considers the beneficiary's remaining job duties, accounting for 60 percent of his time, to be qualifying duties.

The remainder of the beneficiary's duties includes "identifying potential customers in the U.S." and "planning marketing, advertising and promotions." The petitioner further noted that the beneficiary's typical duties include preparing sales documentation, negotiating with customers, and preparing various documents for the petitioner's accountant and attorneys. The petitioner has not clearly defined the beneficiary's duties associated with marketing, planning and promotions, described the nature of his negotiations with customers, or explained why "preparing sales documentation" should be categorized as a managerial or executive duty. Furthermore, without further clarification, his role in assisting with the preparation of legal and accounting documentation could be considered specialized administrative functions, rather than traditional managerial duties. The petitioner does not have any financial, administrative or clerical workers on staff.

The petitioner has also submitted 20 pages of time sheets completed by the beneficiary which detail the day-to-day activities of the company between November 2009 and February 2010, a time when the beneficiary was the only employee in the U.S. office. These time sheets suggest that the beneficiary is single-handedly responsible for handling any and all types of customer inquiries, including requests for product licenses, workshops, price quotations, and product information. Further, the AAO notes that these types of duties, such as maintaining customer relationships, providing information about updated products, scheduling appointments, organizing workshops and issuing trial licenses, appear to be duties that the petitioner intends to assign to the customer relationship manager, a position that was not filled at the time the petition was filed in January 2010. Overall, it is evident that the non-qualifying duties associated with the petitioner's business extend beyond "holding workshops, attending trade shows and visiting customers." The petitioner has not established that it has direct employees, indirect employees or outside contractors to relieve the beneficiary from performing these other operational and administrative tasks.

The beneficiary's only claimed subordinate, [REDACTED], is based in Switzerland and the petitioner has not clearly defined what role he fulfills for the U.S. company. According to the petitioner's business plan, it was the company's intention that he would be a sales and marketing assistant responsible for "contacting new customers, scheduling customer visits and arranging workshops and seminars." Based on this description, the role appears to be similar to that of the "customer relationship specialist." The petitioner has also identified [REDACTED] position as that of a "sales engineer" and indicates that he performs "the actual selling the product," and "continues to work on U.S. clients under the beneficiary's supervision." The petitioner has

offered no further insight into the duties [REDACTED] currently performs from the foreign entity's office in Switzerland or how he relieves the beneficiary from primarily carrying out the day-to-day operations of the U.S. company. 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)). As noted above, it is evident based on the documentation submitted that the beneficiary is very much involved in day-to-day customer interactions.

The petitioner has provided evidence that it filled the position of customer relationship manager approximately two months after it filed the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Accordingly, the hiring of this additional worker will have no bearing on the AAO's determination of the beneficiary's eligibility as of the date of filing the petition.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to adequately document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial.

The petitioner concedes that the beneficiary allocates 40 percent of his time to conducting workshops, attending conferences, and visiting customers. The record does not support a finding that the remainder of his time is allocated to qualifying duties, as it is evident that the beneficiary is required to perform operational and administrative tasks beyond those that the petitioner conceded. For this reason, the AAO cannot conclude that the beneficiary would be performing primarily managerial duties.

On appeal, counsel asserts that the director erred by failing to conclude that the beneficiary is employed 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. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed position description describing the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Here, the petitioner has not clearly identified the essential function managed by the beneficiary, nor has it sustained its burden of demonstrating that his duties are "primarily" managerial, for the reasons already

discussed. Further, even though a function manager is not required to directly supervise or control a subordinate staff, the petitioner must still establish that someone other than the beneficiary is responsible for performing the day-to-day, non-managerial functions associated with the operation of the petitioner's business, particularly if the beneficiary is the sole employee of the company.

Counsel may be claiming that the beneficiary is managing the function of establishing the new office in the United States. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii). The petitioner cannot request an extension of a petition involving a new office on the premise that the beneficiary will continue to oversee establishment and staffing of the office.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO acknowledges that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Even though the petitioning enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from establishing that the beneficiary meets the statutory definitions of either managerial or executive capacity. For the reasons discussed above, the petitioner has not met that burden as it has not established that the beneficiary's duties are primarily managerial.

The AAO acknowledges that the beneficiary is a founder of the U.S. and foreign entities and is likely expected to play a leadership role in the delivery of its products. The reasonable needs of the petitioner will not, however, supersede the requirement that the beneficiary be "primarily" employed in a managerial or

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

The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; the petitioner must, however, establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. The AAO concurs with the director's determination that the petitioner has failed to support its claim that the beneficiary will be employed in a primarily managerial or executive capacity. We emphasize that our holding is based on evidence in the record indicating that the beneficiary performs primarily non-managerial duties; our decision does not rest on the size of the petitioning entity.

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.