



U.S. Citizenship  
and Immigration  
Services

D7

[Redacted]

DATE: Office: VERMONT SERVICE CENTER FILE: [Redacted]

OCT 22 2012

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

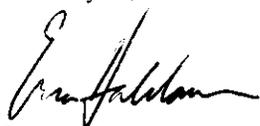
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INSTRUCTIONS:

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,

  
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 seeking to classify the beneficiary as an 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 Georgia limited liability company, states that it operates as an Indian bakery; retailer and wholesaler. It claims to be an affiliate of [REDACTED] located in Nizamabad, India. The petitioner seeks to employ the beneficiary in L-1A status for a period of three years so that he may serve in the position of President/CEO.

The director denied the petition, concluding that the petitioner failed to establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) that the foreign entity has employed the beneficiary 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 misapplied applicable law and came to erroneous conclusions of fact in denying the petition. Counsel 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.

## II. Discussion

### A. Employment Capacity in the United States

The first issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States 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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 2, 2009. The petitioner indicated on the Form I-129 that it operates as an Indian sweets restaurant, retailer and wholesaler, with gross annual income of \$809,381. In a letter dated December 1, 2009, the petitioner stated that, as President, the beneficiary will "manage, direct, oversee & develop the sales & financial operations" of the company. The petitioner explained that the beneficiary will also be responsible for: hiring, firing, staff training, banking, accounting, and marketing. The petitioner provided specific duties for the position of President/CEO with a percentage of time to be spent performing each as follows:

Operations: (40%)

- Review, assess and analyze current operations of [the petitioner] to evaluate performance of the U.S. affiliate company; streamline existing procedures and devise and implement new procedures to maximize profitability.
- Review potential menu changes and pricing points with partner and management.
- Review existing retail operations, domestic shipping procedures and transportation of goods.
- Oversee compliance with all local, state and federal food, health and safety requirements
- Oversee compliance with all local, state and federal laws, including FLSA and OSHA
- Determine effective marketing strategies
- Work with local vendors, restaurants, exhibits, etc. to market our products in the community
- Represent the business in all public and private affairs

Human Resource: (25%)

- Hire, train and fire (if necessary) lead chef and management personnel. Assign or delegate responsibilities to management.
- Supervise management personnel. All managerial staff will report directly to him.

Expansion: (35%)

- Analyze potential areas of growth for the U.S. affiliate company. Devise marketing strategy for wholesale operations and locate potential vendors. Perform market research and assess market share.
- Meet with potential new partners, co-investors, vendors, and/or investors to secure additional sources of capital for investment in current business and for potential expansion of operations
- Meet with banks to secure additional sources of capital
- Prepare due diligence, review contracts, discuss contracts with attorneys.

The petitioner submitted a copy of the company's organizational chart showing the beneficiary as President. Reporting to the beneficiary were the Manager/Lead Chef, Accountant, and Kitchen Assistant.

The director issued a request for additional evidence ("RFE") on February 4, 2010 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a comprehensive list of the beneficiary's proposed duties;

(2) evidence that the beneficiary will function at a high level within the organizational hierarchy, or, evidence that the beneficiary will be managing a subordinate staff or professional, managerial, or supervisory personnel that will relieve him from performing non-qualifying duties; and (3) a list of United States employees identifying each by name and position title with a complete position description and educational requirements for each position.

In a response dated April 20, 2010, the petitioner stated that the beneficiary "will clearly be employed" in a "managerial/executive" capacity in the United States. The petitioner resubmitted the job description provided with the initial filing. The petitioner submitted an organizational chart showing the beneficiary as President/CEO. Reporting to the beneficiary were the manager/lead chef and accountant, both full-time positions. Reporting to the manager/lead chef was a full-time kitchen assistant and two part-time kitchen assistants.

The petitioner also provided the requested position descriptions for the United States employees. The only position requiring a Bachelor's degree was the position of accountant. The positions of manager/lead chef and kitchen assistant were listed as having no educational requirements.

The director denied the petition on June 21, 2010, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position. The director determined that the petitioner did not demonstrate that the beneficiary would function at a senior level within the organizational hierarchy or that he would supervise or control the work of other supervisory, professional, or managerial employees who could relieve the beneficiary from performing the services of the corporation.

On appeal, counsel asserts that the evidence of record establishes that the beneficiary functions in a managerial or executive level position.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed 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 in either an executive or a 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). The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

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 document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "determin[ing] effective marketing strategies," working with local businesses to market the petitioner's products, and devising marketing strategies do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing managerial duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Although the petitioner claims that the beneficiary directs and manages sales, compliance, operations, and corporate growth, it does not claim to have anyone on its staff to actually perform routine duties associated with these functions. Thus, either the beneficiary himself is performing these functions or he does not actually manage the functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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). If the beneficiary is performing these tasks, the AAO notes that 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

While the counsel has submitted a revised job description on appeal, the AAO notes that it diverges significantly from the prior description provided. The initial descriptions appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation. 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). Furthermore, counsel's description of the beneficiary's proposed duties merely paraphrases the statutory definition of executive capacity. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel

managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). Therefore, 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.

In response to the RFE, the petitioner provided the educational levels and job descriptions for the beneficiary's subordinates. According to the petitioner, only the accountant position requires a bachelor's degree. As stated by the petitioner in the initial filing and in response to the RFE, the petitioner spends 25% of his time managing all staff. The petitioner did not specify how much of the 25% of the beneficiary's time is actually spent managing the accountant. The petitioner has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. The fact that the beneficiary spends less than 25% of his time managing one professional level employee does not sustain the petitioner's burden of proving that the beneficiary's duties are "primarily" managerial.

Furthermore, the beneficiary stated on the Form I-129 and on the organizational chart submitted with the initial petition that there were three employees working for the petitioner at the time the petition was filed on December 2, 2009. In response to the RFE, the petitioner submitted an organizational chart showing five employees other than the beneficiary working for the petitioner. The petitioner did not submit any other evidence substantiating the number of employees at the time of filing other than the organizational chart. 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).

On appeal, counsel for the petitioner claims that the beneficiary "oversees supervises [*sic*] managers who supervise employees running day-to-day operations." As stated above, the petitioner has not provided consistent evidence regarding the number of employees at the time of filing. In the initial filing, the petitioner stated that there is only one part-time kitchen assistant. In response to the RFE there appear to be three part-time kitchen assistants. Therefore, the record does not support a finding that the beneficiary would oversee managers who in turn supervise other employees.

To the extent that the petitioner plans to staff the company with additional employees or hired employees while the petition was pending, the record shows that those employees were not hired as of the date of filing the Form I-129. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971). The AAO concurs with the director's determination that the petitioner based on the structure described at the time of filing, would not require the beneficiary to primarily engage in managerial or executive duties. Thus, the petitioner has not

shown that the beneficiary's proposed subordinate employee(s) as of the date of filing were supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The AAO notes 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). In reviewing the relevance of the number of employees a petitioner has, however, 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 (9<sup>th</sup> 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)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner was established for the purpose of operating a bakery for retail and wholesale purposes. The record shows that the business is a restaurant and bakery that is open for business 76 hours per week. At the time of filing, the petitioner claimed to have an accountant, one manager/lead chef, and one part-time kitchen assistant. The beneficiary, while charged with management of the company, would also be the only full-time employee working for the United States company performing the compliance, marketing, and operations tasks. Additionally, the petitioner lacks staff to perform other kitchen duties, cashiers, and other positions normally filled in a restaurant environment. The two kitchen staff claimed at the time of filing could not reasonably operate the restaurant by themselves. Thus, it is reasonable to conclude, and has not been shown otherwise, that the beneficiary performs all other administrative and operational tasks associated with the operation of the bakery. The petitioner has not established that it had a reasonable need for the beneficiary to perform primarily managerial or executive tasks as of the date of filing.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his time on non-qualifying duties. Again, 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 Int'l*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. See section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary

will be employed primarily in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

*A. Employment Capacity with the Foreign Employer*

The second issue addressed by the director is whether the petitioner established that the beneficiary was employed by the foreign employer in a primarily managerial or executive capacity.

In the petitioner's letter dated December 1, 2009, the petitioner stated that the beneficiary was qualified for the managerial position in the United States, as he gained over two years of experience "in restaurant bakery management, including purchasing, hiring and training of staff."

In the director's RFE dated February 4, 2010, he requested *inter alia* the following: (1) a description of the typical managerial responsibilities performed by the beneficiary abroad; (2) the amount of time allotted by the beneficiary to executive duties and non-executive functions; and (3) the degree of discretionary authority exercised by the beneficiary on a day-to-day basis.

In a response dated April 30, 2010, the petitioner provided a list of managerial responsibilities which included overseeing catering and event planning for party orders, preparing sales projections and placing orders with the chef, and supervising the store/bakery manager in accounting. The petitioner also provided a list of duties performed by the beneficiary including researching price points, placing orders for raw ingredients, supervising managerial employees, overseeing cash transactions, calculating payroll, and performing personnel duties. The petitioner stated that the beneficiary's time "was almost exclusively allotted to executive duties." The petitioner also explained that the beneficiary had full authority over day-to-day functions of the organization.

In denying the petition, the director concluded that the petitioner failed to establish that the beneficiary was employed in a managerial or executive capacity by the foreign employer. The director noted that the duties provided by the petitioner did not appear to be managerial or executive in nature.

On appeal, counsel for the petitioner provides a greatly expanded description of the beneficiary's duties. Counsel includes a four page description of the beneficiary's duties for the foreign employer including a breakdown of percentage of time spent on each duty. Counsel states that based on this position description, the beneficiary's position is clearly managerial or executive in nature.

Upon review, and for the reasons stated herein, the petitioner has not established that the foreign entity employed 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 in either an executive or a managerial capacity. *Id.*

As discussed above, 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 failed to document what proportion of the beneficiary's duties performed for the foreign entity are managerial functions and what proportion are non-managerial in response to the director's RFE. The petitioner states that the beneficiary spends almost all of his time performing executive duties, but the list of duties provided by the petitioner illustrates that almost none of the duties performed by the beneficiary are executive or managerial in nature. Specifically, duties such as researching price points, placing orders for raw ingredients, overseeing cash transactions, calculating payroll, and performing personnel duties are not managerial in nature. The actual duties themselves 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).

While the counsel has submitted a revised job description on appeal, the AAO notes that it diverges significantly from the prior description provided. The initial descriptions appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the foreign entity's operation. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Furthermore, counsel's description of the beneficiary's proposed duties merely paraphrase the statutory definition of executive capacity. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Based on the initial description of the beneficiary's position with the foreign entity, the petitioner failed to establish that he has been employed in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

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.