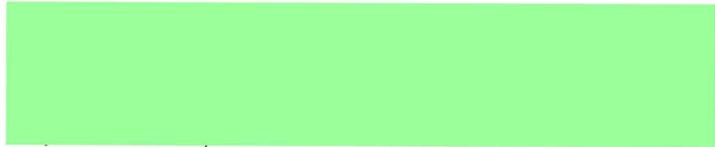


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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

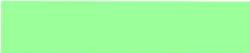


U.S. Citizenship
and Immigration
Services



DATE: **JUL 23 2013**

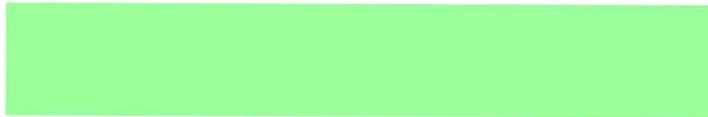
Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

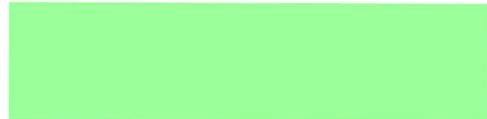
Petitioner:

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you

A handwritten signature in black ink, appearing to read "D. Rosenberg".

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 status 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 is a California corporation, established in 2009, engaged in the design and sale of home medical equipment. The petitioner states that it is a wholly owned subsidiary of [REDACTED] located in Taiwan.¹ The beneficiary was previously granted one year as an L-1A nonimmigrant intracompany transferee as the company's director of market development in order to open a "new office" in the United States.² The petitioner now seeks to extend the beneficiary's employment for an additional three years.³

The director denied the petition, concluding that the petitioner had not established that the beneficiary is employed primarily in a qualifying managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director erroneously found that the beneficiary is not a manager or executive in the United States, as defined by the Act. The petitioner has not submitted documentary 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.

¹ The petitioner asserts that the foreign employer acquired a 100% interest in the petitioner in June 2011 through the purchase of all of the petitioner's outstanding shares.

³ The AAO notes that an extension of stay may only be authorized in increments of up to two years. See 8 C.F.R. 214.2(l)(15).

- (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.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a "new office" petition must submit 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 with the petitioner in a managerial or executive capacity:

The first issue to be addressed on appeal is whether the petitioner has established that the beneficiary is primarily employed in the United States in an executive or managerial capacity as required by 8 C.F.R. § 214.2(l)(3).

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.

On appeal, counsel asserts that the director erred in concluding that the beneficiary was not acting primarily in a qualifying managerial or executive capacity in the United States. Counsel states that the beneficiary supervises a team of sales representatives and thereby qualifies as a manager. Counsel also states that the beneficiary gathers marketing data in the United States related to the petitioner's industry, analyzes this data, and communicates this information to the Chief Executive Officer of the foreign employer as necessary for the foreign employer to tailor its products to the U.S. market. Counsel maintains that this is a high level duty that would not be entrusted to a "day-to-day employee," but only to an executive or managerial employee. Further, counsel indicates that the beneficiary makes decisions on advertising, the allocation of sales staff, and product use, noting that these duties are "demanding and complex" and consistent with an executive or managerial employee.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary performs primarily executive or managerial duties with the petitioner, as required by the Act.

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). In support of the I-129 Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's duties with the petitioner as follows:

[The beneficiary] supervised commissioned sales staff, deploying their time into crucial areas in the most efficient manner for business development and increased sales. [The beneficiary] has implemented marketing campaigns within the US to attract new customers. She has also interviewed existing customers and potential clients to conduct market research, to advising [sic] the overseas parent company as to the customer's needs in the US – thereby altering product design and manufacturing processes to better adapt to market needs. [The beneficiary] has also been successful in getting key products mentioned in industry media and publications, in addition to raising our profile by attending conferences and industry trade shows.

In a Request for Evidence (RFE), the director asked petitioner to provide a more detailed description of the beneficiary's duties with the petitioner, including the percentage of time the beneficiary devoted to each duty. In response, the petitioner submitted categories of duties, including specific explanations of the duties encompassed within each category and related percentages of time spent on each duty category. The general categories and percentages submitted were as follows:

- Supervising and Managing Commissioned Sales staff (35% of time)
- Implementing Marketing Campaigns (25%)
- Recommend Marketing and Key Product Developments to Parent Company (20% of the time)
- Product Placement in Industry Specific Media (10% of the time)
- Hire new employees, expand operations, and ensure continued growth of the US operations (10% of time)

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The evidence submitted by the petitioner does not establish that the beneficiary primarily performs executive or managerial duties. The beneficiary's duties include the performance of many day-to-day operational duties included throughout the general duty categories listed above. For instance, the duties state that the beneficiary researches potential clients, ensures that current and potential clients are satisfied with the service provided by sales representatives, communicates with key accounts, and logs customer feedback into a software application.

Further, the record also does not support that the beneficiary performs the executive or managerial tasks asserted in the beneficiary's duties. Although the duties submitted in response to the RFE state that the beneficiary leads a team of 13 independent contractor sales representatives, the record elsewhere asserts that these contractors are only loosely affiliated with the petitioner and not under the managerial control of the beneficiary. For instance, the petitioner states in its business plan that the aforementioned sales representatives are wholly independent contractors whose services were garnered through widely used healthcare sales representative networks. The business plan also notes that these employees sell medical products outside those provided by the petitioner. 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). As such, the record suggests that the sales representatives are not subordinates to the beneficiary, but independent contractors merely being provided with access to the petitioner's network of products to sell to their customers.

Furthermore, despite submitting sales commission reports for some of the listed sales representatives, the petitioner has not submitted sufficient evidence to establish that these sales representatives are controlled and managed by the beneficiary. For example, the petitioner does not submit contracts with the sales representatives to illustrate the terms of their engagement with the petitioner or evidence that indicates the number of hours the sales representatives work for the petitioner. 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 such, it has not been demonstrated that the beneficiary spends a significant amount of time supervising independent sales representatives as asserted in her duties.

Additionally, the petitioner has not established that the petitioner has sufficient fulltime employees to relieve the beneficiary from primarily performing necessary day-to-day operational duties related to the business. As noted, the petitioner states that the beneficiary is the only fulltime employee for the petitioner, along with 13 independent contractor sales representatives largely devoted to sales activities. However, many operational duties are apparent on the record and no other employees are available to perform these duties beyond the beneficiary. For instance, the petitioner mentions promotional efforts via the internet and the identification of distribution channels. The petitioner also appears to have ordering, inventory, billing and delivery processes requiring administration on a daily basis. Consistent with this, the petitioner submitted various invoices generated by the petitioner during the first year of operations, many of which list the beneficiary as the sales representative directly responsible for the sale of products.⁴

Further, the petitioner states in an income statement submitted in response to the RFE that it accrued \$600,000 in sales in 2012 and paid \$25,411.80 in commissions. Also, the income report notes a commission rate of 10%. However, the provided numbers suggest that commission payments of approximately \$60,000 should have been made, indicating that a significant portion of the petitioner's sales were completed by the only non-commissioned based employee, the beneficiary.

⁴ The AAO notes that the beneficiary is also referred to as ' [REDACTED] ' on the petitioner's organizational chart. The name ' [REDACTED] ' is included on several invoices as a sales representative responsible for the sale of medical products.

The petitioner also references on the record that it has been engaged in the printing of promotional items, the setting up of booths at exhibitions, the completion of surveys, the enhancement of product design and the completion of product testing. However, without any other fulltime employees devoted to non-sales tasks, it is not clear from the evidence presented who performs these various day-to-day operational duties necessary to run the petitioner's business. 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. 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, 591-92 (BIA 1988).

Counsel also asserts that the beneficiary qualifies as a manager consistent with the Act based upon her supervision of the aforementioned 13 independent contractor sales representatives. 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). The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The AAO does not find counsel's assertion that the beneficiary qualifies as a personnel manager convincing. The petitioner does not assert that any of the 13 independent contractor sales representatives reporting to the beneficiary are managers, supervisors, or professionals as necessary to qualify the beneficiary as a personnel manager. Although the petitioner asserts that it will soon hire fulltime managerial subordinates to the beneficiary, prospective hires may not establish a beneficiary as a personnel manager. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, as previously mentioned, the petitioner has not submitted sufficient evidence to demonstrate that the sales representatives work frequently enough for the petitioner to be primarily engaged in their management. Also, the petitioner does not submit evidence to establish that the beneficiary is able to take personnel action against, or control the work of, the contractors. In fact, statements in the petitioner's business plan suggest that the sales representatives operate separately from the petitioner's organization selling medical supplies for different companies as part of various independent health supply sales representative networks. Again, 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 such, the petitioner has not established with sufficient evidence that the beneficiary qualifies as a personnel manager.

Counsel also asserts on appeal that the petitioner has established that the beneficiary performs primarily in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The petitioner has not provided sufficient evidence to establish the beneficiary as an executive. As noted previously in this decision, the totality of the evidence on the record suggests that the beneficiary is primarily performing day-to-day operational duties. For instance, the petitioner does not establish the existence of employees necessary to perform administrative tasks such as billing, shipping, delivery, inventory management, amongst other operational tasks apparent on the record, and the offered sales representatives are not offered as performing these tasks. Also, the beneficiary is asserted to perform many non-qualifying operational duties, such as conducting marketing surveys and monitoring customer feedback. As such, the petitioner has not established that the beneficiary is primarily focused on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. Also, the beneficiary is not asserted as having a subordinate level of managerial employees necessary to allow her to primarily focus on executive level tasks. As noted by the regulations, a beneficiary will not be deemed an executive simply because they hold an executive title or because they direct the enterprise, but the petitioner must establish with sufficient evidence that the beneficiary operates in an elevated position within a complex organizational hierarchy. However, the petitioner has not met this burden. Again, 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)).

In conclusion, the petitioner has not submitted sufficient evidence to establish that the beneficiary acts primarily in a managerial or executive capacity. Therefore, the appeal must be dismissed.

B. Qualifying Relationship:

Beyond the decision of the director, the petitioner has provided insufficient evidence to establish a qualifying relationship exists between the foreign employer and the petitioner as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the 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 regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, the petitioner asserts that it is a wholly owned subsidiary of the foreign employer, [REDACTED] located in Taiwan. The petitioner states that it was acquired by the foreign employer in 2011 through the foreign employer's purchase of all outstanding shares of the petitioner. The petitioner further noted that it submitted "stock purchase documents for the acquisition of [the petitioner] by the [foreign employer]." However, the aforementioned documentation is not apparent on the record.⁵ In fact, the petitioner has submitted little evidence to establish the asserted parent-subsidary relationship beyond a Form 1120 U.S. Corporate Income Tax Return for 2011 that lists the foreign employer as owning 100% of the petitioner's stock. The petitioner, at minimum, should have submitted stock certificates reflecting the foreign employer's asserted ownership in the petitioner. Additionally, the petitioner could also have provided a stock certificate ledger, stock certificate registry, corporate bylaws, or the minutes of relevant annual shareholder meetings to determine the total number of shares issued, the exact number of shares issued to the foreign employer, and the subsequent percentage ownership and its effect on corporate control. Additionally, other documents relevant to establishing ownership and control would be agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. Also, evidence establishing the exchange of monies, property, or other consideration furnished to the entity in exchange for stock ownership may have been presented. *See Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). Although the petitioner was not specifically requested by the director to provide the evidence set forth above, the petitioner must still meet the burden of establishing a qualifying relationship. As such, without the disclosure of any documentation relevant to ownership in the petitioner, the AAO is unable to determine whether the asserted parent-subsidary relationship exists.

Therefore, the petitioner has not submitted sufficient evidence to establish a qualifying relationship between the petitioner and the foreign employer. For this additional reason, the appeal will be dismissed.

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 reviews appeals on a *de novo* basis).

III. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁵ The petitioner also asserted that it submitted incorporation documents for the petitioner and the foreign employer, and an "annual report." This documentation is not apparent on the record.