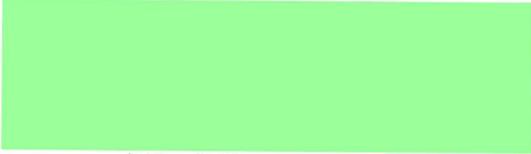




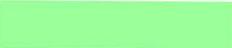
U.S. Citizenship  
and Immigration  
Services

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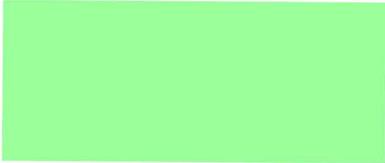
DATE: Office: VERMONT SERVICE CENTER

FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

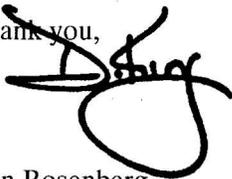
ON BEHALF OF PETITIONER:



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,  


Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

On February 21, 2012, the petitioner filed this nonimmigrant petition seeking to qualify 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 is a Texas corporation, established in January 2011, engaged in the sale of carpeting and flooring products.<sup>1</sup> The petitioner states it is an affiliate of [REDACTED] located in Venezuela. The petitioner seeks to employ the beneficiary as the petitioner's vice president and executive manager for three years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary would be employed primarily in a 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. On appeal, counsel asserts that the director's conclusion that the beneficiary would not primarily perform executive or managerial duties is based on erroneous interpretations of fact and law. Counsel notes that the director failed to consider the probative value of certain relevant evidence submitted on the record establishing the beneficiary as a manager consistent with the Act.

### 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.

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<sup>1</sup> Counsel states on appeal that the petitioner is a "new office" consistent with the regulations. See 8 C.F.R. § 214.2(I)(3)(v). However, the record reflects that the petitioner purchased an already operating business on June 27, 2011 for \$332,969.38 called [REDACTED] located in Houston, TX. Texas Sale and Use Tax Return documentation submitted on the record indicates that the purchased business accrued \$41,318.00 in revenue in July 2011, a month subsequent to the petitioner's acquisition. The petitioner additionally submits substantial documentation, in the form of expenses and invoices, demonstrating that [REDACTED] conducted regular business before, and after, the petitioner's acquisition of the business. Further, the petitioner did not indicate that it was a new venture prior to appeal and does not submit evidence consistent with a new office, such as business, investment, or future hiring plans. In sum, the preponderance of the evidence supports that the petitioner is an existing office in the United States currently doing business as defined by the regulations. As such, the petitioner will not be adjudicated as a new office as suggested by counsel on appeal, but as an already existing office in the United States.

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.

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.

## II. The Issue on Appeal:

The lone issue to be addressed is whether the petitioner established that the beneficiary would be primarily employed in a managerial or executive capacity with the petitioner. As noted, the director denied the petition, concluding that the petitioner had not established that the beneficiary would be primarily employed with the petitioner in a managerial or executive capacity. The director stated that it was readily apparent that the beneficiary would not occupy a managerial or executive position with the petitioner since the petitioner did not establish that the beneficiary oversaw subordinate professionals. The director also noted that the beneficiary's duties were overly vague. The director concluded that it was likely that the beneficiary was primarily engaged in providing sales and services to clients and not directing the organization as asserted.

On appeal, counsel asserts that the director misapplied law by requiring evidence of baccalaureate degrees to establish the beneficiary's subordinates as professionals, noting that professional subordinates are not mandatory to establishing a beneficiary as an executive or manager consistent with the Act. Counsel states that the beneficiary qualifies as a manager through his management of other subordinate supervisors who primarily perform managerial duties. Counsel also maintains that the director improperly found that the petitioner did not adequately respond to the director's request for evidence (RFE), asserting that the petitioner provided sufficient evidence to establish subordinate managers and employees necessary to relieve the beneficiary from performing day-to-day operational tasks. Counsel additionally states that the director improperly considered the size of the entity, and the type of business, in concluding that the petitioner could not support a manager, as defined by the Act.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will primarily perform executive or managerial duties for the petitioner.

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(I)(3)(ii). In the I-129 Petition for a Nonimmigrant Worker, the petitioner submitted the following job duty description for the beneficiary:

The Vice President & Executive Manager job position requires developing and implementing accounting procedures, billing methods, profit/loss analysis and internal auditing measures for the company; service development, as well as, managing the sale of products by employees; responsibility for hiring, firing and supervising employees and handling negotiations for commercial contracts; and negotiating purchasing contracts and expanding the client customer base to increase our market presence in the United States.

The position of Vice President & Executive Manager will direct the management of the company, including establishing goals and policies. It requires directing the company's financial goals, objectives and budgets. As well as overseeing the investment of funds and manage associated risks. The Vice President & Executive Manager position has complete authority and control over the company budgets and contracts and will make managerial decisions, after analysis, regarding developing and planning company budgets, expanding methods of sale of company products, company profit/loss analysis and contracts for additional purchases, specifically for licensing and purchasing agreements. The position requires making managerial decisions regarding internal auditing measures, billing methods and service development. The Vice President & Executive Manager will direct the company goals and policies to the subordinate level manager employees, who will then ensure they are implemented through their first-line supervision of the lower level employees. The Vice President & Executive Manager will establish goals and work duties for subordinate level supervisor employees, and handle performance reviews for all employees.

The petitioner also elaborated that the beneficiary would conduct employee evaluations every six months thereby assessing the performance of all company employees in relation to established goals and policies and ensuring their implementation. Further, the petitioner noted that the beneficiary would hold complete discretionary authority over day-to-day operations and the ability to hire, fire or promote all employees in the company. Elsewhere on the record, the petitioner also described the beneficiary's duties and included hours devoted to categories of tasks, as follows:

Plan and direct operational activities of the company. Formulate policies and establish goals for long term corporate growth. Responsible for handling negotiations for commercial contracts, including purchasing contracts. Responsible for service development. It requires directing the company's financial goals, objectives and budgets. As well as overseeing the investment of funds and manage associated risks. 20 hours per week.

Oversee employees, primarily directing and supervising employee positions. Responsible for hiring and firing of Managerial and subordinate level employees. Responsible for final hiring and firing decisions of all employees after evaluating recommendations. Manage sale of product by employees: 10 hours per week.

Develop and implement accounting procedures, billing methods, profit/loss analysis and internal measures for the company. Exercise complete authority and control over the

company budgets and contracts and will make managerial decisions, after analysis, regarding developing and planning company budgets, expanding methods of sale of company products, company profit/loss analysis and contracts for additional purchases, specifically for licensing and purchasing agreements. 10 hours per week.

100 percent of job duties allotted to executive/managerial duties.

The director concluded that the duties provided for the beneficiary were not sufficient to establish that the beneficiary acted primarily in a managerial or executive capacity. As such, the director asked in a request for evidence (RFE) that the petitioner submit, *inter alia*: (1) a letter from an authorized representative of the petitioner stating the managerial decisions to be made by the beneficiary on behalf of the U.S. entity; (2) a description of the typical managerial responsibilities to be performed by the beneficiary, such as the method of evaluating the employees under the beneficiary's supervision; and (3) how much time the beneficiary allots to executive/managerial duties as opposed to non-executive/managerial duties.

In response to the director's RFE, the petitioner did not submit additional specifics regarding the beneficiary proposed executive or managerial employment in the United States, but reiterated the duties set forth above in a response letter. The AAO notes that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Further, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has provided no specifics as to how the beneficiary will carry out the general tasks and goals listed above as a part of his daily duties. For instance, the petitioner did not provide specific examples, or supporting documentation regarding accounting procedures, billing methods, profit/loss analysis and internal auditing measures for the company that will be established. Further, the petitioner has not submitted sufficient evidence to confirm that the beneficiary will spend a significant portion of his time negotiating commercial and purchasing contracts, as no examples or copies of such contracts are presented on the record. Indeed, there is little in the duties to distinguish the provided duties from those of any executive or manager with any company and the U.S. duties are repetitive of the statutory language. As such, the lack of specificity or examples in the provided U.S. duties casts doubt on their credibility. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. 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)). 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.).

Additionally, material doubt is cast on the beneficiary's U.S. duties when they are compared to other assertions and documentary evidence presented on the record. For instance, the petitioner asserts a number of times on the record that the beneficiary will fully devote his time to executive or managerial duties. However, the record also reflects that the beneficiary has already performed various day-to-day operational tasks for the petitioner, such as: (1) ordering and paying for the implementation of

sales software in July 2011, (2) purchasing a truck for the business in August 2011, (3) acquiring liability insurance for the petitioner in September 2011, and (4) ordering and paying for carpeting supplies from a vendor called in December 2011. As such, the petitioner's assertion that the beneficiary will be solely devoted to executive or managerial tasks is not credible and the inconsistency of this claim casts doubt as to whether the beneficiary is primarily performing executive or managerial duties. 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).

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. 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). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The petitioner has not sufficiently established that the beneficiary will spend a majority of his time performing executive or managerial tasks. For example, the petitioner notes that a central responsibility of the beneficiary will be handling negotiations of commercial, licensing, and purchasing contracts. But, no examples of contracts to be negotiated are provided nor is documentation submitted to support that such contracts have been negotiated by the beneficiary in the past. In fact, the record reflects the petitioner orders inventory and sells goods largely through the exchange of purchase orders. Additionally, the beneficiary is offered as spending a significant portion his time making hiring and firing decisions related to his subordinates. However, the record reflects little hiring on the part of the petitioner, as it only currently has four employees and a number of independent contractors performing part time installation of flooring and carpeting. Although the petitioner asserts that there has been significant turnover in the organization in the approximate seven months between the filing of the petition and the petitioner's response to the RFE, the organizational chart submitted in response to the RFE reflects the hiring of only two new employees during this period. Further, the petitioner has not provided significant future hiring plans that would support a conclusion that a significant portion of the beneficiary's time will be devoted to hiring and firing decisions, beyond the intention to hire one additional employee in the position of administrative accounting supervisor following the approval of the petition. 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)).

The primary assertion of counsel on appeal is that the beneficiary qualifies as a manager based on his management of other subordinate managers and supervisors. Counsel states that the director erred in

requiring that the petitioner demonstrate that the beneficiary's subordinates were professionals, as defined by law, in order to establish that he would act primarily as a manager or executive. The AAO concurs in part with counsel's assertion that the director erred in finding that the beneficiary's subordinates must be established as professionals to qualify the beneficiary as a personnel manager. A personnel manager may be established through his or her supervision of other supervisory or managerial employees, as well as through his management of subordinate professionals. 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).

Despite the error on the part of the director, the AAO does not find the record persuasive in demonstrating that the beneficiary has managerial and supervisory subordinates to establish him as a personnel manager. In response to the director's RFE, the petitioner submitted an updated organizational chart reflecting the following managerial subordinates reporting to the beneficiary: (1) [REDACTED] Inside Sales Supervisor, (2) [REDACTED] Outside Sales Supervisor, and (3) [REDACTED] Administrative Sales Assistant. Additionally, the petitioner states that it plans on hiring an additional supervisor, [REDACTED], to act in the role of administrative accounting supervisor. In turn, the petitioner asserts that the administrative account supervisor will supervise [REDACTED] and the subordinate warehouse dispatcher. Further, the organizational chart notes that the sales supervisors, [REDACTED] and [REDACTED] will supervise ten installation contractors. However, the job duty descriptions of the three asserted supervisors, and the beneficiary, do not support that these subordinates primarily act in supervisory roles as stated by the petitioner. Indeed, the petitioner states in the beneficiary's duties that he will be responsible for evaluating, hiring, firing and promoting all employees in the company. Also, the job duty descriptions of the sales supervisors describe typical duties of a sales representative such as generating sales through developing relationships with key clients, executing sales calls, and maintaining knowledge of product lines. The duties only make passing reference to their supervision of, and provision of direction to, the independent contractors. Although the petitioner submitted contracts and IRS Form W-9 Requests for Taxpayer Identification Number and Certification with respect to thirteen independent contractors, the petitioner does not clearly specify how often these independent contractors work for the petitioner to discern whether their employment could allow the sales supervisors to send a majority of their time acting as managers. The petitioner does submit various checks and subcontractor pay sheets that credibly establish that it employs various independent contractors to complete carpet and flooring installations, but the AAO is unable to discern from these records whether the contractors are employed regularly enough to allow for the inside and outside sales supervisors to work in their asserted managerial roles. In fact, the job duty descriptions for the inside and outside sales supervisors do not mention any responsibility for installation despite their asserted supervision of numerous installation contractors. Also, the duties of the administrative sales

assistant, another claimed manager, reflect duties related to inventory tracking, order placement, mailing, billing, and other administrative activities, and do not establish that she is significantly responsible for managing her asserted subordinate employee, the warehouse dispatcher. Lastly, the petitioner also states that it plans on hiring another supervisor, the administrative accounting supervisor, to manage the both the administrative sales assistant and the warehouse dispatcher. But, 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). In sum, the preponderance of the evidence does not establish that the beneficiary has subordinate managers as necessary to qualify him as a personnel manager.

The petitioner has also not demonstrated that his subordinates are professionals, as defined by law, in order to qualify him as a personnel manager. The petitioner submits educational credentials for his asserted subordinates in the form of unofficial transcripts, but this evidence is not sufficient to establish that any of the petitioner's employees are professionals. As previously noted, 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 petitioner has not submitted evidence sufficient to demonstrate that the positions discussed herein, related to carpet and flooring sales and requisite administrative support, require advanced knowledge such that a prerequisite is the attainment of at least a baccalaureate level degree in a specific field of study. Although the petitioner has shown that his outside sales supervisor has attained a baccalaureate level degree, the presence of such a degree alone is not sufficient to establish a subordinate as a professional. Indeed, the job descriptions of each managerial position state that the petitioner merely prefers a minimum of two years of college education and do not confirm that a baccalaureate level degree, or a degree in any specific field, is required for these positions. The petitioner has also not articulated how any of the asserted managerial positions require knowledge of an advanced type in a given field gained by a prolonged course of specialized instruction. In fact, the nature of these positions suggests that knowledge relevant to the position would most likely be attained through prior sales or job experience, as noted in the position requirements, not through a prolonged course of specialized instruction. Therefore, the petitioner has not demonstrated that any of the beneficiary's subordinates are professionals as defined by law.

Lastly, counsel also states that the director improperly considered the size of the entity, and the type of business, in concluding that the petitioner could not support a manager as defined by the Act. Counsel correctly observes 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, 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15. The AAO concurs with counsel that the director acted in error, in part, by basing his conclusions

on the petitioner's type of business without sufficient supporting reasons and by concluding that pictures of the beneficiary's employees suggested they were not professionally employed. However, the AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). As such, establishing an error on the part of the director alone is not sufficient to demonstrate eligibility. As specified in this decision, the petitioner has not: provided a sufficiently detailed and credible job description for the beneficiary, submitted adequate evidence to establish that the beneficiary primarily performs executive or managerial duties, or demonstrated that the beneficiary has managerial or supervisory subordinates as necessary to establish him as a personnel manager as asserted by counsel. Therefore, the petitioner has not established that the beneficiary will act primarily in an executive or managerial capacity with the petitioner. For this reason, the appeal must be dismissed.

### III. Conclusion

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.