



U.S. Citizenship
and Immigration
Services

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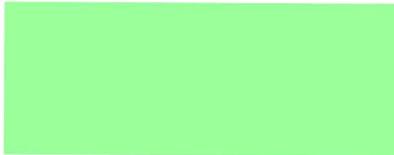


Date: **OCT 07 2013** Office: CALIFORNIA SERVICE CENTER FILE:

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,

Ron Rosenberg
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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Colorado limited liability company established in 2010, states that it operates a conference and event planning business. The petitioner claims to have a qualifying relationship with [REDACTED] located in Canada. The petitioner seeks to employ the beneficiary as its managing director for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been employed abroad 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 evidence is sufficient to establish that the beneficiary's position abroad was primarily managerial or executive. Counsel submits a brief and additional evidence on appeal.

I. The Law

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

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

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

States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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. Managerial or Executive Capacity

The sole issue addressed by the director is whether the petitioner established that its Canadian affiliate employed the beneficiary in a qualifying managerial or executive capacity.

A. Facts

The petitioner states that the beneficiary has been employed with its foreign branch office for approximately 13 months in the position of "senior manager, sponsorship and exhibit sales."

The petitioner stated that in this position, the beneficiary was responsible for the overall direction, coordination, and evaluation of subordinate employees and that she carried out supervisory responsibilities including interviewing, training, planning, assigning and directing work, evaluating performance, rewarding and disciplining employees, addressing complaints, and resolving problems. The petitioner also stated that the beneficiary was responsible for raising money through the sale of sponsorship packages for conferences, creating sponsorship and exhibitor packages, and attending weekly company meetings, sales update meetings, and conference planning meetings. The petitioner explained that the beneficiary delegated administrative functions to assistants and that she supervised the manager of sponsorship and exhibit sales.

The petitioner listed the beneficiary's essential duties with the foreign entity, as follows:

- Delegate administrative functions to assistants, and oversee the work of Manager, Sponsorship and Exhibit Sales;
- Meet with trade and professional organizations and other groups to organize, promote, and discuss [the company's] conference/trade show services; Utilize telephone solicitation, electronic and written correspondence and face-to-face

meetings as tools in order to reach and exceed the budgeted sponsorship target for each conference;

- Research and develop a list of potential sponsors/exhibitors for each conference; Develop and maintain relationships with existing and potential sponsorship clients and exhibitors;
- Keep precise records of conversations with all clients, sponsors and exhibitors;
- Update the company Maximizer database as required;
- Invoice sponsors and exhibitors once agreements have been reached; Coordinate various services for clients;
- Assist in preparing promotional material to advertise sales opportunities;
- Maintain knowledge of conference timelines and sponsorship deadlines; and
- Professionally represent [the company] at all times.

The petitioner submitted two organization charts. The Vancouver office organization chart names the beneficiary as the senior sponsorship and exhibits manager and identifies the role as a sales department position. A sponsorship and exhibits manager is depicted as directly subordinate to the beneficiary and a sponsorship and administration coordinator is positioned directly under the sponsorship and exhibits manager. The chart indicates the sponsorship and exhibits manager position is vacant. The individual named as the sponsorship and administration coordinator is also named as conference coordinator, a position that is depicted as reporting to a different manager. The beneficiary's exact position within the foreign entity's hierarchy is unclear based on this chart.

The second organization chart submitted is for the petitioner's overall organization, including offices in Vancouver, Toronto, Denver and Vienna. This chart indicates that the director of business development is immediately subordinate to the president, oversees sponsorship and exhibit sales managers, and manages company sales. No employees are identified by name on this chart.

On December 18, 2012, the director issued a request for evidence ("RFE"), instructing the petitioner to submit additional evidence that the beneficiary has been performing the duties of a manager or executive with the foreign entity. Specifically, the director requested: (1) a more detailed description of the beneficiary's duties abroad identifying the percentage of time required to perform the duties of the foreign position; and (2) a copy of the foreign entity's line and block organization chart showing the organization's current hierarchy and staffing and listing all employees in the beneficiary's immediate division, department, or team to include names, job titles, a summary of duties, education level, and salary.

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In response to the RFE, the petitioner provided a description of the beneficiary's duties with the foreign entity and the percentages of time spent on each duty, as follows:

- Delegate administrative functions to assistants, and oversee the work of Manager, Sponsorship & Exhibit Sales and Sponsorship & Administration Coordinator; (55%)
- Meet with trade and professional organizations and other groups to organize, promote and discuss [the company's] conference/trade show services; utilize telephone solicitation, electronic and written correspondence and face-to-face meetings as tools in order to reach and exceed the budgeted sponsorship target for each conference; (25%)
- Research and develop a list of potential sponsors/exhibitors for each conference; Develop and maintain relationships with existing and potential sponsorship clients and exhibitors; (15%)
- Keep precise records of conversations with all clients, sponsors and exhibitors; (1%)
- Update the company Maximizer database as required; (1%)
- Invoice sponsors and exhibitors once agreements have been reached; Coordinate various services for clients; (1%)
- Assist in preparing promotional material to advertise sales opportunities; (1%)
- Maintain knowledge of conference timelines and sponsorship deadlines; and (1%)
- Professionally represent [the company] at all times. (100%)

The petitioner resubmitted the previously provided organization charts, along with job descriptions for the positions of sales coordinator (executive assistant), conference coordinator, international conference manager, and sponsorship sales manager.

The job description for the sponsorship sales manager included the following "essential duties and responsibilities":

- Utilize telephone solicitation, electronic and written correspondence and face-to-face meetings as tools in order to reach and exceed the budgeted sponsorship target for each conference;
- Research and develop a list of potential sponsors for each conference;
- Research and develop a list of potential exhibitors when required;

- Develop and maintain relationships with existing and potential sponsorship clients and exhibitors;
- Keep precise records of conversations with all clients, sponsors, and exhibitors;
- Update the company Maximizer database as required;
- Invoice sponsors and exhibitors once agreements have been reached;
- Coordinate various services for clients;
- Assist in preparing promotional material to advertise sales opportunities;
- Maintain knowledge of conference timelines and sponsorship deadlines;
- Delegate administrative functions to assistants where possible;
- Meet with trade and professional organizations and other groups to organize, promote, and discuss [the company's] conference/trade show services; and
- Professionally represent [the company] at all times.

The position description also states that the position requires: "[a] Business Administration or equivalent degree, with 2-4 years' experience in corporate sales" however, "[a] reasonable combination of education and experience will also be considered."

The director ultimately denied the petition, finding that the petitioner failed to establish that the beneficiary has been employed abroad in a position that is primarily managerial or executive in nature. The director stated that the described duties indicate that the beneficiary performed tasks necessary to provide services, rather than performing primarily qualifying managerial or executive duties.

On appeal, counsel for the petitioner asserts that the beneficiary meets the definitions of both "function manager" and "personnel manager."

Counsel states that the director erred by focusing on four non-qualifying duties that made up only 40% of the petitioner's responsibilities, and were only sub-duties of larger managerial responsibilities. Counsel asserts that the beneficiary spends 60% of her time performing qualifying duties, and is, therefore, employed in a primarily managerial capacity. Counsel specifically highlights that "55% of the beneficiary's duties abroad were spent 'delegating administrative functions to assistants, and overseeing the work of Manager, Sponsorship and Exhibit Sales and Sponsorship & Administration Coordinator.'"

Counsel claims that the beneficiary manages an "essential function" because the success of the company's foreign and domestic conference services depend on sponsorship and exhibit sales. Counsel further states

that the beneficiary "exercises discretion over the day-to-day operation associated with nearly \$1.6 million annual revenue" and has the discretion to bind the petitioner contractually "as she is solely responsible for authoring sponsorship and exhibitor packages" In the alternative, counsel claims that beneficiary is a personnel manager because the beneficiary supervises and controls the work of two full-time professionals, and that one of the beneficiary's subordinates is a manager.

Counsel claims that the beneficiary is part of the senior management team on the second tier of the corporate hierarchy, together with other managers, including the president, director of business development, and director of virtual conferences, and that she has complete discretionary authority over the overall direction, coordination, and evaluation of employees, with discretion to hire subordinate staff and independent contractors.

B. Analysis

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the foreign entity has employed the beneficiary in a managerial or executive capacity.

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).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Several of the beneficiary's described duties suggest that the beneficiary performs the company's sales function rather than primarily managing this function. For example, the petitioner states that the beneficiary spends 25% of her time meeting with trade and professional organizations and other groups to organize, promote, and discuss the company's services and using telephone solicitation, correspondence, and meetings to reach or exceed sponsorship targets for each conference; 15% percent of her time researching and developing a list of potential sponsors and exhibitors for each conference and developing relationships with existing and potential clients; and a total of 5% of her time keeping precise records of client conversations, updating the company database, invoicing for the sponsors and exhibitors, preparing promotional material to advertise sales opportunities, and maintaining knowledge of conference timelines and deadlines. These duties do not typically qualify as managerial in nature, but suggest that the beneficiary performs the

company's sales duties and administrative tasks associated with sales. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties; the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act.

Counsel asserts that, while the beneficiary may allocate 40 % of her time to the non-managerial duties listed above, her are primarily managerial because she spends 55% of her time delegating administrative functions to assistants and overseeing the manager, sponsorship and exhibit sales, and the sponsorship and administration coordinator. However, the evidence on record is inconsistent with respect to the number and type of employees the beneficiary actually supervises. Although the Vancouver office organization chart depicts two levels of subordinates beneath the beneficiary, the chart indicates that the sponsorship and exhibit sales manager position was vacant at the time of filing and at the time the petitioner responded to the RFE. It is unclear how the beneficiary is able to spend the claimed majority of her time supervising the vacant position. The petitioner did not identify whether the position was ever occupied, whether there is a temporary vacancy, or whether it is a newly created position. 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). The petitioner has not provided any evidence to reconcile the inconsistencies or to establish that the beneficiary has the subordinate employees necessary to perform her claimed primary function. Further, the job duties provided for the vacant sponsorship sales manager position are essentially the same as those attributed to the beneficiary, with the exception of the supervisory function. It is reasonable to question whether the beneficiary is required to allocate additional time to these sales functions in the absence of a subordinate to assist her with the sales aspects of her position.

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).

On appeal counsel claims that the beneficiary is a personnel manager because she supervises two educated employees including one manager; however, the petitioner has not provided evidence to support that the beneficiary has been employed as a personnel manager.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary

schools, colleges, academies, or seminaries." 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).

Although the petitioner claims that the beneficiary supervises two educated employees, the record is devoid of evidence that the beneficiary's claimed subordinates qualify as professionals. A position description for the sponsorship sales manager states that the position requires "a Business Administration degree or equivalent" and that "[a] reasonable combination of education and experience will also be considered." However, because the record indicates that the position is vacant, there is no evidence that the beneficiary has any subordinate employees with a bachelor's degree. Even if a sponsorship and exhibit sales manager were employed, the petitioner has not established that a bachelor's degree is required to perform the described duties. No position description has been provided for the sponsorship and administration coordinator, and no education credentials are provided for the individual named in that position. It is noted that the record also contains a position description for the Sales Coordinator (Executive Assistant), but the organization charts provided do not indicate that this position is subordinate to the beneficiary. Without evidence that a bachelor's degree is required and evidence that the beneficiary's subordinate possesses the required bachelor degree, the petitioner has failed to establish that the beneficiary manages professionals.

The petitioner also failed to establish that the beneficiary manages supervisory or managerial employees. As discussed above, the organization chart indicates that the sponsorship and exhibit sales manager position is vacant. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Even if both positions under the beneficiary on the Vancouver organization chart could be considered, the described duties of the sponsorship sales manager do not support the placement of the sponsorship and exhibit sales manager on the organization chart. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (*cited in Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). The position description for the sponsorship sales manager does not include any duties to indicate the position has oversight or authority over the sponsorship and administration coordinator. Furthermore, the company-wide organization chart depicts that the sponsorship and exhibit sales managers are subordinate to the director of business development, but does not include any positions subordinate to the sponsorship and exhibit sales managers. The petitioner has not established that the beneficiary's subordinates are managerial or supervisory employees and has failed to establish that the beneficiary has been employed primarily as a personnel manager.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the

organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a job description that clearly explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii).

The evidence on record does not support counsel's claims that the beneficiary manages the sponsorship and exhibit sales function of the foreign entity. Counsel claims on appeal that the beneficiary "is part of the senior management team" and compares her position to the president and director of business development, but has not provided evidence to support these assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The company's organization chart indicates that the director of business development manages the sales department, and both the Canadian and international organization charts indicate that the beneficiary is subordinate to the director of business development and is one of only two employees involved in sponsorship and exhibit sales. The only other occupied position in the department is "sponsorship and administration coordinator" and the organization chart indicates that this employee also works as a conference coordinator and reports to a senior conference manager. The beneficiary cannot be deemed to be a function manager of sponsorship and exhibits sales by virtue of being the only employee who works full-time on sponsorship and exhibits sales functions.

The totality of the record indicates that the beneficiary is more likely than not primarily involved with providing the foreign entity's sponsorship and exhibit sales services rather than primarily focused on the management of the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

On appeal, counsel claims that the beneficiary is solely responsible for authoring sponsorship and exhibitor packages. The position description for the beneficiary and the subordinate sponsorship and exhibit sales manager are the same, excepting the beneficiary's claimed supervisory duties. As discussed, the organization chart indicates that the individual named as the sponsorship and administration coordinator is also named as the conference coordinator, a position subordinate to the conference manager rather than the beneficiary. No position description is provided for the sponsorship and administration coordinator and it is unclear whether the shared subordinate is sufficient to relieve the beneficiary from performing the non-qualifying day-to-day sales activities necessary to support a company with a claimed annual revenue of \$1.6 million. Without evidence that the beneficiary has sufficient subordinate staff to allow her to focus primarily on the management of the sponsorship and exhibit sales function, the petitioner has not established that the beneficiary has been employed as a function manager.

Based on the foregoing discussion, the petitioner has not established that the beneficiary has been employed by the foreign entity in a managerial capacity. For this reason, the appeal will be dismissed.

III. Conclusion

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.