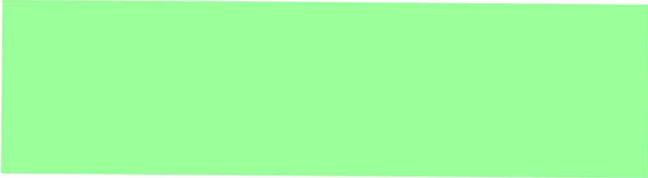
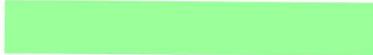


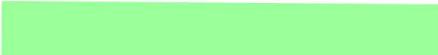


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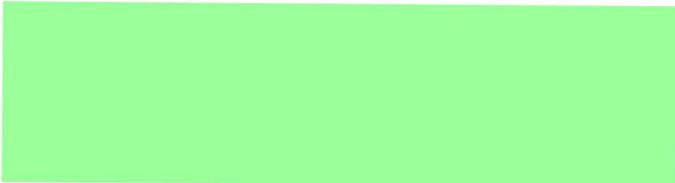


DATE: **MAR 26 2014** Office: VERMONT SERVICE CENTER 

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

The petitioner filed this nonimmigrant petition seeking to 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, a New Jersey limited liability company established in November 2011, claims to import and export sports gloves, sportswear and fabrics. It claims to be a subsidiary of See [REDACTED] located in Pakistan. The beneficiary was previously granted one year in L-1A status in order to serve as the executive managing director of the petitioner's new office and the petitioner now seeks to extend his status.¹

The director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying 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 petitioner established that it will employ the beneficiary in a managerial or executive capacity under the extended petition. Counsel submits a brief and additional evidence in support of the appeal.

I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

¹ The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker that the beneficiary will be coming to the United States to open a "new office." At the same time, the petitioner acknowledged that the beneficiary was previously granted L-1A status and stated at Part 2 of the Form I-129 seeking an extension of status based on "continuation of previously approved employment without change with the same employer." USCIS records show that the beneficiary was previously granted one year in L-1A classification to open a new office. Therefore, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) apply; the petitioner may not be granted a second "new office" L-1A visa approval.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on May 31, 2012. On the Form I-129, the petitioner indicated that it imports sports gloves, sportswear, and exports synthetic fabrics. The petitioner stated that it had a gross annual income of \$102,782 and three current employees at the time of filing. The petitioner indicated that the beneficiary performs the following duties as Executive Managing Director:

He develops pricing strategy to help the company maximize profits and market share while ensuring that customers are satisfied. He ensures that his business friends are satisfied with all of his services, and he is in charge of public relations and communicating with overseas companies (10%), negotiating pricing, meeting and signing contracts for sale and buying with overseas companies (10%), and he has authority to make major decisions in contract negotiations with overseas companies (15%). He supervises the placement and receiving of orders and settles payment terms with overseas companies (15%). He approves marketing products, magazine ads, exhibit shows, including brochures and flyers for company to improve (15%). He designs and prepares technical plans and drawings for the shapes, colors, materials, designs, and presentation of gloves and other sporting goods (10%). He directs mailing and internet protocols (25%).

According to the petition, the foreign employer, a Pakistani corporation, is the petitioner's parent company and the beneficiary is the parent company's majority stockholder. In a letter submitted in support of the petition, former counsel for the petitioner stated that the beneficiary continues to oversee 63 employees, including six intermediate managers, in his dual role with the foreign entity. Counsel stated that the beneficiary performs the following duties for both the U.S. and foreign entities:

[The beneficiary] formulates and manages human resources policies and practices, including hiring, training, appraisals, promotions, terminations, team building and employee welfare. [The beneficiary] performs all final interviews of candidates for hiring. He also reviews all performance appraisals and approved them. Generally, the team leads write up the performance appraisals, which are then reviewed by an assistant manager or manager, and then [the beneficiary] performs the final review and approves it. He also reviews and approves all promotions and terminations.

He formulates policies and practices for the company, including relations with clients and potential clients, advertising and pricing. He has formulated the firm's export and import marketing strategy. He develops pricing strategy to help the company maximize profits and market share while ensuring that customers are satisfied.

He exercises discretion in public relations and communicating with overseas companies, negotiating pricing, meeting and signing contracts for sale and buying with overseas companies, and he has authority to make major decisions in the contract with the overseas companies. He exercises discretion in the placement receiving of orders and settles payment terms with overseas companies. He approves marketing products, ads in magazines, exhibit shows, including brochures and flyers for company to improve.

He sets goals for both companies, make a prime distributor of Cycle glove, Weight lifting gloves, Motorcycle summer gloves, Motorcycle winter gloves, Motocross gloves, Police gloves, Boxing gloves, grappling gloves, Bag gloves and other sports

goods and buying Synthetic fabrics and raw materials and export to Pakistan and increase the sales and buying volume in coming years, and expand his business relations with leading brand to all over Europe and America.

Counsel stated that the petitioner has three employees including the beneficiary. The beneficiary's subordinates include: (1) an office manager who "[c]ommunicates with US customers, makes invoices, and other office related work" and earns \$15,080 per year; and (2) a warehouse controller who earns \$15,080 per year and performs the following duties:

Solid understanding of stock control, processes and distributes products with invoices, receives and inspects all incoming materials and reconciles with purchase orders, reports, and documents, tracks damages, storage and dispatch of products, stock control and warehousing, helps drive, load and unload, and pack products for shipment.

The petitioner provided evidence of wages paid to both employees. The petitioner's organizational chart depicted the beneficiary as Executive Managing Director with two direct subordinates; the petitioner's office manager and the director of operations for the foreign entity. The petitioner's initial evidence also included emails exchanged between the beneficiary and various customers which appear to demonstrate ongoing business operations. For example, emails include order verifications, questions to the beneficiary about pictures, price lists, and availability of products, receipt of information, receipt of items, receipt of payments, billing, specifications, and negotiations demonstrating the beneficiary's significant involvement in the day-to-day operations of the business.

On August 16, 2012, the director issued a request for evidence (RFE) to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director requested a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis; a list of all U.S. employees by name along with their weekly job duties and work schedules; specific evidence to show who would perform the petitioner's routine day-to-day functions; and an organizational chart.

In response to the RFE, the petitioner provided the following description of the beneficiary's duties:

He manages marketing, advertising and relationships with clients and potential clients, 30%. This includes directing public relations and communicating with overseas companies, negotiating pricing, meeting and signing contracts for sale and buying with overseas companies, and he has authority to make major decisions in contract negotiations with overseas companies. He approves marketing products, magazine ads, exhibit shows, including brochures and flyers for company to improve.

He estimates the demand for products offered by the firm and its competitors and keeps track of overseas trends that indicate the need for new products in both overseas markets and the domestic market. He manages the amount produced of the various products offered by the firm and directs development of new products, 30%.

He develops pricing strategy to help the company maximize profits and market share while ensuring that customers are satisfied, 10%.

He manages the work of the U.S. employees as well as the work of the 56 employees of the foreign parent company, 40%. This includes supervising and directing the work of the four intermediate supervisors in the overseas company, directing production of new products, supervising and reviewing hiring of employees, promotions, and performance reviews.

His goal is for the U.S. company to become a prime distributor of different kinds of gloves, leather jackets, leather chap, leather pant, bjj kimonos, mixed martial arts, and boxing gear, and other sports goods and as a buyer and exporter of lycra fabrics, synthetic fabrics and raw materials to export to Pakistan. He foresees increasing both sales and buying volume in coming years, and expanding his business relations with leading brands all over Europe and America.

In addition, the petitioner reiterated its previous descriptions of the beneficiary's duties, and resubmitted its organizational chart and evidence of payments made to the office manager and warehouse controller.

On April 15, 2013, the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. The director found that the petitioner did not establish that the beneficiary would be managing professionals, supervisory or managerial employees or that the beneficiary would be relieved from performing non-qualifying duties, such that he could perform primarily managerial or executive duties.

On appeal, counsel asserts that petitioner was experiencing development and growth but felt that the company was "still too premature for the beneficiary to leave this developing division and go back to Pakistan to the parent company." Counsel reiterates the beneficiary's role in directing all of the managers and supervisors employed with the Pakistani parent company in addition to the petitioning company.

Counsel asserts that the director erred by: (1) failing to consider "sizeable operations of the petitioner's parent company" and the beneficiary's simultaneous management requirements; (2) placing "undue emphasis on the small size of the petitioning company in the United States"; (3) finding that the beneficiary would not be relieved from performing non-qualifying duties. Counsel explains that the petitioner's letter states that the office manager would perform day to day office functions and that it should be implied that given the beneficiary's high level of responsibility he "would not be performing ordinary day to day functions such as answering the phone and making regular invoices." Finally, counsel cites to an April 23, 2004 agency memorandum from William R. Yates, which states that in matters related to an extension of nonimmigrant petition validity involving the same parties and the same underlying facts, deference should be given to an

adjudicator's prior determination of eligibility.² In support of the appeal, the petitioner submits additional invoices and business documents.

B. Analysis

Upon review, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity under the extended petition.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner initially described the beneficiary's duties by allocating a percentage of time into seven general areas of responsibility. Specifically, the beneficiary would spend 10% of his time engaged in public relations and customer service; 10% in negotiations involving pricing and contracting; 15% of his time approving contracts; 15% supervising the placement, receipt and payment of orders; 15% approving marketing; 10% designing and preparing plans and drawings related to the business; and 25% directing mailing and internet protocols.

The petitioner's letter accompanying the petition also explained the beneficiary's duties but failed to distinguish the beneficiary's tasks performed for the petitioner from the tasks concurrently performed as director of the Pakistani parent company. The description included many of the duties described above but added additional responsibilities such as formulating human resource policies and practices, interviewing candidates, hiring employees, reviewing and approving employees appraisals, reviewing and approving all promotions and terminations. The petitioner offered no clarifying percentage of time the beneficiary would devote to any of these additional duties or how much time was devoted specifically to the parent company.

In response to the RFE the petitioner offered a third version of the beneficiary's duties, explaining that the beneficiary would devote 30% of his time to public relations and marketing, 30% to monitoring development of products and directing product development, 10% on pricing strategy and customer satisfaction, and 40% managing the work of individuals employed by both the petitioner and Pakistani parent company.

After reviewing these conflicting descriptions, the AAO is unable to determine how the beneficiary will actually spend his day while directing the petitioning company. 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

² Memorandum of William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity*, (April 23, 2004).

competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO acknowledges that the beneficiary may direct and/or manage both the petitioner and its parent company. However, 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 operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary directs or manages the foreign parent company and the petitioning entity does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary performed and would perform were/are only incidental to the position in question. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Here, each version of the beneficiary's duties suggests that the beneficiary would be performing non-qualifying duties or would be overseeing work for which the petitioning company has no employees assigned to perform. For example, the petitioner states that the beneficiary will direct or manage marketing, direct mailing and internet protocols yet neither of the petitioner's employees perform duties related to those areas. Further, the beneficiary's direct role in public relations, negotiating contracts, settling payment terms, and designing and preparing company product designs suggest that the beneficiary is significantly involved in non-managerial functions. The petitioner submitted e-mail correspondence which established the beneficiary's performance of operational duties in these areas. As already noted, the subsequent duty descriptions were inconsistent and offer no clarification regarding the beneficiary's actual duties. Therefore, it is not possible to determine which duty description most accurately defines the beneficiary's actual role and the petitioner has not explained the inconsistencies.

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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "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 petitioner submitted evidence establishing that it had three employees, including the beneficiary, at the time this petition was filed. The petitioner indicated that one of the employees was an office manager and the other, a warehouse controller. The petitioner provided no evidence to establish that either of these employees are professionals and the petitioner attributes no supervisory or managerial duties to either employee. The beneficiary appears to rely on both employees for different duties and serves as a first-line supervisor to both. Therefore, the petitioner did not establish that the beneficiary qualifies as a personnel manager and did not claim, in the alternative, that the beneficiary manages an essential function of the organization.

On appeal, counsel asserts that the director failed to consider the beneficiary's concurrent management over the large Pakistani parent company and placed undue emphasis on the petitioner's size. The AAO acknowledges the petitioner's claim but the petitioner must establish for approval of this petition based on the beneficiary's role in a managerial or executive capacity for the petitioning company. The petitioner has provided no evidence to establish that any of the foreign employees concurrently provide services to the petitioning company in order to relieve the beneficiary from involvement in non-managerial functions. Accordingly, the record does not support a finding that the beneficiary's oversight of foreign employees is relevant to his employment capacity with the petitioner.

Similarly, the petitioner has not established that the beneficiary is employed 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.* Here, while the beneficiary exercises authority over the petitioning company as its senior employee, the petitioner

has not claimed that he allocates his time primarily to the broad goals and policies of the organization, rather than to the company's day-to-day operations. The petitioner's initial breakdown of the beneficiary's duties did not include responsibilities that fall within the statutory definition of executive capacity.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

Counsel asserts that it is implied that given the beneficiary's high level of responsibility he would be relieved from performing day-to-day functions such as "answering the phones" and "making regular invoices." While this may be true, the petitioner has not established that its day-to-day operations are limited to the administrative minutiae of such low level tasks but also include a number of non-qualifying tasks which are attributed to the beneficiary, including customer service, pricing negotiations, product designs and drawings, and first-line supervision of non-professional personnel. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a qualifying managerial or executive position.

Finally, the AAO acknowledges counsel's reliance on the 2004 Yates memorandum in support of his assertion that the director should have given deference to the prior approval of an L-1A petition filed on behalf of the beneficiary. However, the Yates memorandum specifically states, at page 2, fn.1, that it does not apply to L-1 new office extension petitions, which are subject to the evidentiary requirements at 8 C.F.R. § 214.2(l)(14)(ii).

Based on the foregoing discussion, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. Accordingly, 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.