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20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: TEXAS SERVICE CENTER

Date:

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IN RE:

Petitioner:

Beneficiary:

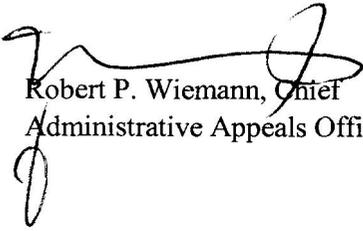
PETITION:

Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition and two subsequently filed motions to reconsider. The director certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn in part and affirmed in part. The petition will be denied.

The petitioner is a limited liability company organized in the State of Florida in June 1998. It imports, exports, and sells shoes. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On April 9, 2003, the director determined without requesting additional evidence that: (1) evidence in the record showed that the petitioner and the foreign entity were inactive for a period of time which resulted in a lack of qualifying relationship; (2) the U.S. petitioner is a partnership, thus is not a separate entity and not eligible to file for this visa classification; (3) the record did not persuasively demonstrate that the beneficiary would be performing in a managerial or executive capacity; (4) the record did not persuasively show that the beneficiary had been employed for one year with a foreign qualifying entity in a managerial or executive position; (5) the petitioner's 2000 Internal Revenue Service (IRS) Form 1065 contained an error and did not demonstrate the petitioner's ability to pay the beneficiary the proffered annual wage of \$60,000; and, (6) the record did not demonstrate that either the foreign entity or the petitioner had been doing business for the year prior to filing the petition. The director concluded that as there was evidence of ineligibility in the record that the petitioner could not overcome, a request for further evidence would be inappropriate. The director determined that the record did not establish eligibility for the classification sought and that the petition could not be approved.

On May 9, 2003, counsel for the petitioner submitted a Form I-290B and a Motion to Reconsider or in the Alternative Appeal.¹ On August 6, 2003 the director issued a decision on petitioner's motion to reconsider. The director noted counsel's assertion that Citizenship and Immigration Services (CIS) denied the petition without giving the petitioner an opportunity to supplement the record with additional evidence or clarify the information provided in the initial filing. Citing 8 C.F.R. § 103.2(b)(8), the director observed that when the evidence in the record shows ineligibility, CIS is not required to request further evidence. The director noted that the decision was denied for multiple reasons, but would address only one in the motion. The director determined that the petitioner was a limited liability partnership, and thus was not a separate legal entity that could petition for the beneficiary. The director determined that the beneficiary had petitioned for herself and that the regulations do not permit self-petitioning for this visa classification. The director concluded that the denial of the petition was "statutory," a request for further evidence was not required, and the petition could not be approved.

¹ Counsel for the petitioner identified the matter on the face of the Form I-290B with the beneficiary's A number and a receipt number for a Form I-765. Counsel also indicated that the motion to reconsider was for a Form I-129, nonimmigrant petition. Counsel when contacted by the director resolved the confusion indicating that the motion to reconsider was in fact for the Form I-140 that is the subject of this certification.

On August 20, 2003, counsel for the petitioner submitted a motion to reconsider, asserting that the documents submitted with the Form I-140 petition and in support of the previous motion clearly establish that the petitioner is a limited liability company, not a limited partnership.

On February 4, 2004, the director affirmed her decision to deny the petition, stating the same six grounds for denial cited in the April 9, 2003 decision, and certified her decisions on the Form I-140 petition to the AAO for review. On certification the director observed that the petitioner was registered with the State of Florida on June 1, 1998, was reinstated with the State of Florida on May 25, 2001, and was currently active. The director also observed that the foreign entity was registered in December 1996, was dissolved and liquidated in December 2000, and re-registered in March 2001. The director concluded that the record did not contain evidence of the length of time the two entities were "out of business" and that when the foreign entity was dissolved there was no foreign entity related to the U.S. petitioner. Also on certification, the director noted that as the U.S. entity was a partnership, it was not eligible to file this petition on behalf of the beneficiary, as the partnership could not be considered a separate legal entity. The director concluded that a partnership petitioning for a partner would be like a beneficiary petitioning for him or herself, which is not allowed for this visa classification. The director also determined that as the foreign entity was dissolved December 29, 2000 and only re-registered March 30, 2001, seven months prior to filing the petition, the foreign entity had not been conducting business for one year prior to filing the petition. The director further determined that as the U.S. petitioner was reinstated May 25, 2001, only five months prior to filing the petition and the record did not contain evidence of how long the petitioner had been inactive, the petitioner had not established that it had been doing business for one year prior to filing the petition. Further, on certification, the director determined that the record did not substantiate that the beneficiary: (1) had been employed in a managerial or executive capacity for the foreign entity for one year prior to entering the United States as a nonimmigrant or (2) would be employed in a managerial or executive capacity for the U.S. petitioner. Finally, on certification the director determined that the petitioner had not established its ability to pay the beneficiary the proffered wage of \$60,000.

The director indicated that due to the concerns of both the petitioner's counsel and the officer making the decision, the denial is certified to the AAO for review. 8 C.F.R. § 103.4(a). Counsel for the petitioner has not offered further argument or evidence subsequent to the certification.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United

States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The regulation at 8 C.F.R. § 204.5(j)(3) states:

- (i) **Required evidence.** A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
 - (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
 - (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
 - (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
 - (D) The prospective United States employer has been doing business for at least one year.

The preliminary issue in this proceeding is whether the director erred in denying the petition without providing the petitioner an opportunity to supplement the record with additional evidence and/or to clarify the information provided in the initial filing.

The regulation at 8 C.F.R. § 103.2(b)(8) states:

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by the Service prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence, including blood tests.

The director denied the petition for multiple reasons. First, the director determined that the petitioner's legal status as a partnership precluded the petitioner from petitioning for the beneficiary as an employment-based multinational manager or executive immigrant. The director's determination was in error. The petitioner provided initial evidence that it had been organized as a "limited liability company" in the State of Florida in June 1998. Although it is treated as a partnership for taxation purposes, a limited liability company is a separate and distinct legal entity from its owner/members. A limited liability company may petition for a beneficiary as an employment-based multinational manager or executive. The record does not contain evidence of ineligibility on this issue. The director's April 9, 2003, August 6, 2003, and February 4, 2004 determinations on this issue will be withdrawn.

Among other issues, the director also denied the petition after determining that the petitioning U.S. company had been dissolved at an indeterminate time and then reinstated on May 25, 2001, approximately six months prior to the filing of the petition. Specifically, the petitioner submitted a copy of the Florida Department of State printout that represented the petitioner as active, but that it had been dissolved since approximately 1999 and subsequently reinstated in 2001. Because the regulations require that a petitioner demonstrate that it has been doing business for the entire year prior to filing the petition, it was appropriate for the director to review the evidence to determine when the company was formed and whether it was an active entity. See 8 C.F.R. § 204.5(j)(3)(i)(D).

Counsel argues that the director improperly denied the petition without a request for evidence because the director made an incorrect conclusion of law based on the Florida document that could have been resolved through additional evidence. Specifically, counsel asserts that the fact that the business was administratively dissolved for a period does not mean that it was not doing business. Counsel claims that the entity was not renewed due to an administrative error and that the reinstatement was effective retroactively, to the date of the dissolution.

The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable or irrebuttable. Where evidence of record indicates that a basic element of eligibility has not been met, it is

appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. In the present case, the evidence indicated that the petitioner was administratively dissolved and reinstated only six months prior to the filing of the petition. Accordingly, the denial was appropriate, even though the petitioner might have had evidence or argument to rebut the finding.

The director listed the remaining issues in her initial decision and certified the matter to the AAO. The AAO will address the evidence in the record and the remaining issues. The AAO sees no purpose in remanding the matter to the director to request evidence and enter a new decision. The AAO finds that the director was not required to issue a request for further evidence to give the petitioner an opportunity to present evidence and to clarify questionable issues prior to entering her decision. 8 C.F.R. § 103.2(b)(8). Furthermore, the petitioner has been given sufficient opportunity to present evidence in its motion to reconsider and could also have submitted evidence on certification. Because the director failed to issue a request for evidence, the AAO will accept any evidence submitted on certification. *Cf. Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Assuming *arguendo* that the director erred, the error would be found to be harmless. A remand for additional evidence would only serve to delay the entry of a final decision in this proceeding.

The first issue in this matter is whether the petitioner established that it was doing business for one year prior to filing the petition and continuing. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." The petitioner is required to submit evidence demonstrating that it has been doing business for one year prior to filing the petition. *See* 8 C.F.R. § 204.5(j)(3)(i)(D) above. The qualifying foreign entity must continue to do business to maintain the multinational character of the petitioner. *See* 8 C.F.R. § 204.5(j)(2).

The director initially determined that the record contained evidence that the legal status of both the foreign entity and the petitioner had been inactive for unknown periods of time prior to filing the petition. The director concluded that the petitioner had not established that it or the foreign entity had been doing business for the year prior to filing the petition.

The petition in this matter was filed November 1, 2001. The AAO observes that the initial record contains, among other documents: (1) a payroll list purportedly showing the foreign entity's employees from December 2000 through April 2001; (2) numerous invoices and purchase orders evidencing transactions by the foreign entity from the beginning of 2000 through September 2001; (3) invoices of transactions by the petitioner beginning in October 2000 through September 2001; and, (4) IRS Forms W-2, Wage and Tax Statements, issued by the petitioner in 2000 and a copy of the petitioner's 2000 IRS Form 1065, U.S. Return of Partnership Income. The AAO notes that the foreign entity's payroll list is partially translated, as are the foreign entity's invoices and purchase orders as well as the petitioner's invoices. The AAO also notes that the petitioner's IRS Form 1065 is unsigned and the initial record does not contain evidence the petitioner's tax forms were actually filed.

The petitioner addressed this issue in its May 9, 2003 motion to reconsider. Specifically, counsel for the petitioner attempted to explain and resolve the inconsistencies relating to the petitioner's inactive status and as observed above, provided evidence that a Florida limited liability company is not a partnership. With respect to the foreign entity, counsel referenced, but did not provide, the law of Colombia to explain the foreign entity's "dissolution," and also references explanations and exhibits submitted in support of an earlier L-1A intracompany transferee petition filed by the petitioner in 1999.

With respect to the dissolution of the U.S. company, counsel asserts that the fact that the business was administratively dissolved for a period does not mean that it was not doing business. As previously discussed, counsel claims that the entity was not renewed due to an administrative error and that the reinstatement was effective retroactively, to the date of the dissolution. Counsel states that the dissolution does not indicate that the U.S. entity was working illegally or otherwise inactive.

Contrary to the claims of counsel, Florida law clearly states that "[a] limited liability company administratively dissolved continues its existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under s. 608.4431 and notify claimants under s. 608.4421." Fla. Stat. ch. 608.4481 (2006). The requirement that a business conduct business for at least one year is not satisfied by the mere existence of a company or the unlawful business transactions conducted by a dissolved company.

As explained in the Federal register at the time of the rule's publication, the "one-year time limit is important as a measure of the viability of the United States employer." 56 FR 60897, 60899 (November 29, 1991). The claimed viability of the company is not bolstered by the fact that the petitioner was administratively dissolved for a substantial portion of the year prior to filing. CIS cannot condone the violation of basic corporate requirements, such as municipal licensing, state and federal income tax filings, or the filing of corporate annual reports. Because the petitioning company was dissolved for at least six months of the year prior to filing, the AAO will not accept the submitted documentation as evidence that it was lawfully doing business.

The submitted evidence is also insufficient to overcome the director's determination that the foreign entity does not continue to do business. First, in immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). Counsel's assertions regarding Colombian law are not evidence. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Second, each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). The record lacks substantive evidence to support the petitioner's claim that the foreign entity continues to do business.

In addition, although the initial record contained some information on the issue of the petitioner's doing business and counsel resolved the petitioner's inactive status, the petitioner failed to sufficiently elaborate on whether the petitioner was providing goods or services for one year prior to filing the petition. The petitioner has not established its multinational status and has not provided sufficient evidence that it is engaged in the

regular, continuous, and systematic provision of goods and services and had been for one year prior to filing the petition. The record is not sufficient to overcome the director's initial April 9, 2003 decision on these issues.

On certification, the director also noted that the foreign entity and the petitioner had been inactive prior to the petitioner filing the petition. The director concludes that if the foreign entity was out of business when the petition was filed, the petitioner could not establish a qualifying relationship with a foreign entity. The AAO concurs that this visa classification requires a qualifying relationship when the petition is filed. *See* 8 C.F.R. § 204.5(j)(3)(i)(C). As noted above, the record contains some evidence and assertions that the foreign entity was active when the petition was filed. However, also as noted above, the record is not sufficient to explain the foreign entity's dissolution, reactivation, and whether it continued to do business.

The second issue in this matter is whether the petitioner established that the beneficiary's position with the United States entity would be managerial or executive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

1. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The director observed in her April 9, 2003 and February 4, 2004 decision that the petitioner claimed six employees, including the beneficiary when the petition was filed. The director noted that five of the six employees were classified as L-1A managers. The director concluded that it was reasonable to believe that the "managers" must be doing the actual work of the company. The director correctly questioned the petitioner's organizational structure and the beneficiary's role and that of her subordinates.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the prospective employer in the United States to furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties to be performed by the alien. The required initial evidence thus, is a statement that clearly describes the beneficiary's intended duties.

Counsel for the petitioner indicated in an October 26, 2001 letter appended to the petition, that the beneficiary managed the operations of the company, negotiated purchases and other contracts on behalf of the corporation and dealt with the suppliers of goods, as well as, ensured that the proper international transshipment deadlines, and letters of credit, are met. Counsel also indicated that the beneficiary managed essential functions of the organization by overseeing the organization and determining which product line(s) should be sold by the company, and what shoes should be exported to Colombia. Counsel further indicated that the beneficiary networked with others within the industry and with potential customers, oversaw sales of the company's product, and as the company's legal representative negotiated contracts with customers, and with vendors for services needed by the company. Finally, counsel indicated that the beneficiary divided her time amongst her various duties as follows:

- (20%) Networking with business industries in community to identify and cultivate new information sources, attend trade shows and conferences to keep abreast of the industry; Identify new markets for penetration and develop marketing strategy accordingly.
- (10%) Travel to communicate with the various suppliers, distributors, clients, and potential clients.
- (15%) Preparation of monthly and annual budget for the operations and monitor finances; determination of buying, legal, inventory, insurance, technology needs of the US company[.]

- (5%) Evaluate and review the services ultimately provided by the company to ensure it meets proper specifications as per customer, and the products to ensure conformity with standards.
- (10%) Maintain regular communication with the foreign affiliate company.
- (25%) Monitor the activities of all employees, including the company's Managers and lower level professionals, and additional employees as they are hired.
- (10%) Establish additional supplier and distribution chains for operations.
- (5%) Misc.

Counsel also noted that the petitioner employed individuals in the positions of marketing and sales manager, accessory sales manager, purchasing manager, and secretary. Counsel did not provide position descriptions for these positions. The beneficiary, on behalf of the petitioner, stated:

This position is a key managerial position in our US company, as I direct the management of the organization, plot sales strategies for the expansion of our business in Miami, and the remaining United States, develop business objectives and time tables within which they are to be completed, and improve communications between the U.S. and Colombian companies.

As Manager, the position also requires that I network with business industries in community to identify and cultivate new information sources, attend trade shows and conferences, negotiate contracts, and evaluate and review the services provided by the company to ensure it meets proper specifications as per customer. Additionally, I am ultimately responsible for the employment activities of all of the US company's employees (the company employs 6 employees).

The description provided by the petitioner through its counsel and the beneficiary does set out the beneficiary's intended duties. The statements contain some generalities, but the breakdown of the beneficiary's duties shows that the beneficiary spends the majority of her time providing the petitioner's marketing, public relations, budget, supply, and distribution services. The beneficiary adds that she also plots sales strategies, negotiates contracts, attends trade shows, and ensures the petitioner's services meet the specifications of the customer.

The petitioner's description of the beneficiary's duties indicates that the beneficiary is not primarily performing managerial or executive tasks or managing an essential function but rather is performing the petitioner's day-to-day operational tasks. 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). An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The record contains evidence that the petitioner employs personnel purportedly holding sales, marketing, and purchasing positions. However, the record does not provide descriptions for these positions. The record does not reconcile counsel and the petitioner's description of the beneficiary's actual duties with the titles of other

employees. The record in this matter does not establish that the beneficiary's position for the petitioner would be managerial or executive.

Counsel had opportunity to submit evidence on this issue in the motion to reconsider and on certification. In the May 9, 2003 motion to reconsider, counsel did provide descriptions of the beneficiary's duties and the beneficiary's subordinates' duties for the petitioner. However, the initial description of the beneficiary's duties conflicts with counsel's description of the beneficiary's subordinates' duties in the motion to reconsider. Counsel did not explain or otherwise resolve the inconsistencies between the initial description of the beneficiary's actual duties and the description of her subordinates' 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The evidence submitted failed to overcome the director's April 9, 2003 decision on this issue.

The third issue in this matter is whether the petitioner established that the beneficiary's employment for the foreign entity had been in a managerial or executive capacity.

Counsel for the petitioner indicated that the beneficiary had held the position of general manager for the foreign entity prior to her entry into the United States as an intracompany transferee nonimmigrant. Counsel indicated: "the beneficiary was responsible for managing the company and other managers and employees, customer relations, dealing with distributors and suppliers of shoes and its related accessories," and "was also in charge of ensuring that customs and other licensing requirements were complied with for the import of foreign supplies." Counsel further stated that the beneficiary "was also in charge of the import and acquisition operations of the company, the hiring and firing of personnel within the organization, and had discretion to make operational decisions on behalf of the company."

The beneficiary, on behalf of the petitioner, stated that her responsibilities for the foreign entity included: "setting of departmental policy and procedure, complete control of the hiring and firing of personnel in the various departments, and monitoring the conditions of the overall sales activity of the company in the international market place," and "responsi[bility] for customer relations with our customers throughout Colombia, and with our various domestic and international distributors."

The director did not analyze the description of the beneficiary's duties for the foreign entity; the AAO observes, however, that the description of the beneficiary's duties for the foreign entity, for the most part is vague and nonspecific. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103. When the petitioner and beneficiary provide detail of the beneficiary's duties for the foreign entity, the beneficiary's duties are more indicative of an employee providing operational services to the foreign entity. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604.

In the May 9, 2003 motion to reconsider, counsel referenced exhibits submitted with the petitioner's L-1A intracompany transferee visa petition to establish the beneficiary's managerial or executive capacity with the foreign entity for the year prior to entering the United States as a nonimmigrant. However, each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Counsel's reference to the beneficiary's foreign payroll documents contained in a separate L-1A proceeding cannot be considered part of this proceeding. If the petitioner wants evidence considered in support of a petition, the petitioner must submit the evidence with the petition, as the record of the nonimmigrant proceeding is not combined with the record of the immigrant proceeding.

Again, counsel had opportunity to submit evidence on this issue in the motion to reconsider and on certification. The record when reviewed in its totality does not substantiate the beneficiary's managerial or executive capacity for the foreign entity. The evidence submitted failed to overcome the director's April 9, 2003 decision on this issue.

The last issue in this matter is whether the petitioner established its ability to pay the beneficiary the annual wage of \$60,000. The director's determination was based on the petitioner's IRS Form 1065 and a misunderstanding of the information contained within the IRS Form.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

When determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In this matter, the director failed to consider that the petitioner had provided evidence that it had paid the beneficiary \$60,000 in 2000. The record contains the beneficiary's 2000 IRS Form W-2 and the beneficiary's personal tax return for 2000 evidencing the petitioner's compensation of the beneficiary. The petitioner established its ability to pay the proffered wage to the beneficiary. The director's April 9, 2003 decision will be withdrawn as it relates to this issue.

In conclusion, the petitioner did provide sufficient evidence that it is a limited liability company. The AAO observes that a limited liability company is statutorily eligible to file a petition on behalf of a beneficiary. The petitioner also provided sufficient evidence that it had the ability to pay the beneficiary the proffered wage when the petition was filed. The director's contrary determinations on these two issues will be withdrawn.

However, the initial evidence provided regarding the beneficiary's duties as a manager or executive for the foreign entity and the United States petitioner depicted an individual employee primarily performing day-to-day operational tasks. Although the director did not request further evidence on these issues, the petitioner had the opportunity and did submit additional evidence in the motion to reconsider. Likewise, the petitioner had the opportunity to clarify and substantiate that it and the foreign entity met the requirements of doing business and maintaining multinational status. However, neither the initial evidence submitted in support of the petition nor the argument and information submitted in the motions to reconsider are sufficient to establish the beneficiary's eligibility for this visa classification. The record does not establish the beneficiary's managerial or executive capacity for the foreign entity or the U.S. petitioner. The record does not establish that the foreign entity and the petitioner continue to do business, thus maintaining the petitioner's multinational classification.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The director's decision is withdrawn in part and affirmed in part. The petition is denied.