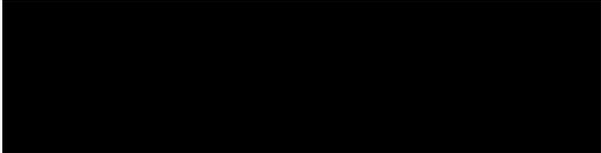


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: WAC 01 213 57451 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



MAR 31 2004

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:

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, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as engaged in the import and export of construction and agricultural goods. The petitioner also states that it has a retail store. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its Vice President. The director determined that the beneficiary has not been and will not be employed in a primarily executive or managerial capacity.

On appeal, counsel asserts that the beneficiary has been and will be responsible for the overall management of the company's business.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.

The United States petitioner was incorporated in 1996 and states that it is a 100% owned subsidiary of Chongqing Yingli Real Estates Development Co., Ltd. of Chongqing, China. On the Form I-129, the petitioner stated that it has five employees and its gross annual income was \$314,593. The initial petition was approved and was valid from June 20, 1998 to June 20, 1999. It was extended for a two-year period and was valid until June 20, 2001. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$18,000.

The only issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties.

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-

- 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.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2 (l) (3) (ii). In this instance, the petitioner states that the beneficiary is the vice president of the company. In the instant petition, the petitioner stated that the beneficiary:

Has been the Vice President in charge of its financial affairs and day-to-day operations since 1998. She has been supervising all aspects of the company. She reviews activity reports and proposals to determine progress. She determines the budget for the company. She also participates in larger project negotiations and approves contracts. She submits regular reports to the overseas parent company. In addition, she has authority to hire and fire employees and evaluate their performances.

The director requested the following evidence to establish that the beneficiary has been or will be performing the duties of a manager or executive with the U.S. company:

- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The

chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, education level, annual salaries/wages (in U.S. Dollar equivalents) and immigration status for all employees under the beneficiary's supervision. Finally explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission.

- Federal Income Taxes: Provide signed and certified copies of the U.S. company's Federal income taxes, to include Forms 1120 for the last three years.
- Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's Form DE-6, Quarterly wage reports for all employees for the last two quarters that were accepted by the States of California. The forms should include the names, social security numbers, a number of weeks worked for the employees.
- Form 941, Quarterly Wage Report: Provide copies of the U.S. company's Federal Form 941 Quarterly Wage Reports for all employees for the last two quarters.

On October 7, 2001, the petitioner submitted a response to the director's request for evidence. The petitioner submitted a list of employees of the U.S. company. The petitioner did not submit an organizational chart. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). This list consists of the president, the vice-president and two retail store clerks. The beneficiary's position of vice president is described as:

Coordinates the business and personnel activities of the company; assists president with budgeting, purchasing, accounting, vendor accounts relationship and employees benefits in conjunction with company's accountant, etc.

The director stated that the submitted evidence does not demonstrate that the beneficiary's duties involve responsibilities which are primarily managerial or executive in nature. The petitioner is not a new office. The director reviewed U.S. company's tax returns and found that the salaries paid to employees for 1997 were \$53,199, \$46,324 for tax year 1998 and \$59,674 in wages for the tax year 1999. The director determined that the W-2, Wage and Tax statements showed \$1,521 in wages was paid to one store clerk and \$2,743 in wages was paid to a second store clerk during the year 2000. The director concluded that the store clerks were part-time employees based on the information provided by the petitioner.

The director concluded that the contained insufficient evidence to demonstrate that the beneficiary has been and will be employed in a managerial or executive capacity. The director found that the record indicated that a preponderance of the beneficiary's duties will be directly providing the services of the business. The director determined the petitioner had provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing the organization or managing the department. The director

stated that the submitted evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The director concluded that the beneficiary is ineligible for classification as an intra-company transferee.

On appeal, counsel explains that in 2000, the board promoted a vice president as president of the petitioning company. Counsel states that the new president had frequent international travel and "the burden of managing the business almost entirely fell on the beneficiary." Counsel did not submit any additional evidence that the beneficiary was managing the business. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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

Counsel restates the beneficiary's position descriptions that were provided in the instant petition and in the response to the director's request for evidence. As previously described by the petitioner, the beneficiary "assists the president" in various functions. Even though counsel states that the beneficiary "has been and will be responsible for the overall management of the company's business," the petitioner did not submit any supporting evidence such as contracts the beneficiary approved or projects she negotiated in order to document the level of the beneficiary's authority. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

On appeal, counsel states that "[t]he nature of the business determines that it has an unstable work force. Its employees change jobs more frequently than those of other types of businesses." The AAO is unclear as to the meaning of these two statements. Counsel further adds "having a retail operation only added the work load of the management [sic]. Decisions regarding the sourcing of supplies, vendor relations, cash flow control, accounting, personnel management, etc. all have to be made by the beneficiary." It is noted that the only personnel of which the petitioner provided evidence were the two part-time retail store clerks.

Counsel's assertions are not persuasive. The AAO notes the 1999 and the 1998 Corporate 1120 tax returns both indicate that the U.S. petitioner's principal business activity is the resale of liquor. The petitioner stated it employed a president, vice president and two retail store clerks. Based on the tax information provided by the petitioner, the director concluded that the store clerks were part-time positions. Counsel admitted that the petitioner has an "unstable workforce" and "its employees change jobs frequently." Additionally, counsel stated that the president travels frequently and delegates much of his duties to the beneficiary. Even though the petitioner stated that the beneficiary "has been successful in securing a number of projects, exporting U.S. company manufactured construction related equipment, such as garage doors, building air conditioners, water coolers, etc. worth more than one million U.S. dollars, to China," the petitioner has not provided any independent evidence that is engaged in any business besides the retail sale of liquor and beer. Based on the evidence provided, the beneficiary is operating the retail store. The beneficiary is primarily engaged in producing the product or providing the services of the petitioner. 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner is engaged in the retail sale of liquor and employs a president, vice president and two part-time sales clerks. The petitioner states that the beneficiary has been and will be responsible for the overall management of the company's business. The fact that an individual operates a business does not necessarily establish eligibility for classification in a managerial or executive capacity with the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties will be directly performing the operations of the organization, operating the retail store. The other two employees are part-time retail clerks. The petitioner has not demonstrated that the beneficiary primarily will be supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Based on the evidence submitted, it cannot be found that the beneficiary has been employed in a primarily executive or managerial capacity.

Additionally, counsel notes that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
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MAR 31 2004

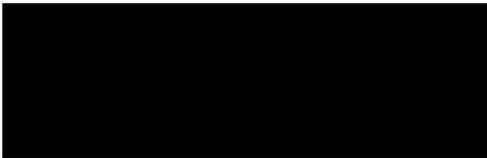
FILE: SRC 02 118 52201 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



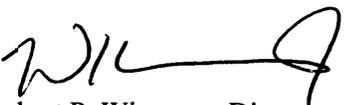
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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, Director
Administrative Appeals Office

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DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as engaging in the business of customs forwarding and is incorporated in Texas. The petitioner seeks authorization to employ the beneficiary temporarily in the United States as its general manager. The director determined that the petitioner had not established that the beneficiary's services are to be used for a temporary period and did not submit evidence that the beneficiary will be transferred to an assignment abroad upon completion of the temporary services in the United States. Also, the director determined that the petitioner did not submit persuasive evidence that sufficient physical premises had been obtained to house the new office. Finally, the director determined the petitioner did not submit evidence that showed that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

On appeal, counsel states that the petitioner submitted evidence that the beneficiary's services are temporary. Counsel also asserts the petitioner submitted evidence that sufficient physical premises had been obtained to house the new office. Additionally, counsel asserts that the petitioner had demonstrated that the U.S. operation will support, within a year of approval, an executive or managerial position.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Under 8 C.F.R. § 214.2(l)(3), 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 serves 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) states 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.

The petitioner, ASAP International, Inc., is incorporated and located in Texas and stated it is an affiliate of ASAP Asesoría Aduanal Programada, S.C., located in Mexico. The Form I-129 states that Adolfo Ignacio Sanchez Aldana owns 51 percent of the stock of the U.S. company and 99 percent of the stock of the foreign company. An attached statement indicates that this same individual has a majority of the ownership of both the U.S. company and the foreign company and also has “the main control and management” of the two companies. Both companies are engaged in the business of customs forwarding.

The first issue in this proceeding is whether the petitioner submitted sufficient evidence that the beneficiary’s services are to be used for a temporary period and evidence that the beneficiary will be transferred abroad. 8 C.F.R. § 214.2 (l)(3)(vii), provides:

If the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary’s services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon completion of the temporary services in the United States.

The director determined that the petitioner did not submit such supporting evidence. On appeal, counsel states “the federal regulation, invoked by the Service with the intention to classify the beneficiary as an owner or a major stockholder of the company, is not applicable and germane in the present case.” It is noted that the beneficiary owns 44 percent of the U.S. company. Counsel states “[t]he beneficiary is not the controlling owner or major stockholder of the U.S. company nor of the foreign company, as demonstrated by the stock certificates of the U.S. company and the articles of incorporation of the foreign company.” However, the regulation at 8 C.F.R. § 214.2 (l)(3)(vii) does not refer specifically to a “controlling owner” but to an “owner or major

stockholder.” The evidence demonstrates that the beneficiary owns 44 percent of the U.S. company and that amount of stock ownership clearly falls within the term “major stockholder.” Therefore, this regulation does apply to the instant case. Counsel also explains that the support declaration from the petitioner submitted with the initial petition states that the beneficiary will occupy a temporary position. This support letter stated “[the petitioner] proposes to employ [the beneficiary] in the United States for a temporary period at a monthly salary of \$3,000. [The petitioner] understands the nature of the assignment and [the beneficiary] has been informed of the conditions of his transfer.” Additionally, counsel states that the beneficiary will be returning to the foreign company “as demonstrated by his recent departure.” There is no statement from the beneficiary’s employer that would substantiate this claim. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Iovic*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). The record indicates that the beneficiary is a major stockholder in the petitioner. The petitioner has not demonstrated that the beneficiary’s services are to be used for a temporary period and did not submit sufficient evidence that the beneficiary will be transferred to an assignment abroad upon completion of the temporary services in the United States. Therefore, based on this issue, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has submitted evidence that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2 (l)(1)(3)(v)(A). On May 8, 2002, the director issued a request for evidence requesting the current office lease for the U.S. company. On June 14, 2002 the petitioner responded to the director’s request. In its response, the petitioner resubmitted the lease that was provided in the initial petition. This lease stated “the lessee shall use and occupy the premises for Storage for products that will be imported or exported. The premises shall be used for no other purposes.” On August 2, 2002, the director issued the decision denying the petition. The director stated “. . . no lease was submitted for administrative or business office space.” The director determined the petitioner did not submit persuasive evidence that sufficient physical premises had been obtained to house the new office.

On appeal, counsel submitted a new lease for the same address with a lease term from July 1, 2002 until June 30, 2003. This new lease states “the premises for Storage for products that will be imported or exported and space available for office.” This lease did not indicate the square footage of the leased space. The petitioner also submitted copies of photos of storage and office facilities. However, the photos did not identify ownership of the storage and office facilities. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner did not submit evidence that sufficient office or administrative space was leased at the time the petition was filed. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

On appeal, counsel states “[i]n the normal conduct of the petitioner’s business, it is not viable to secure simple storage without adjacent office space dedicated to the administration of the business affairs of the enterprise. For

this reason, the petitioner's office is contained and furnished inside the storage premises." Again, the assertions of counsel do not constitute evidence. *Matter of Obaigbena, supra*. The petitioner has not clearly explained or provided evidence to document that the petitioner had sufficient space to house the new office when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, the appeal must be dismissed.

The third issue in this proceeding is whether the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position. On May 8, 2002, the director requested the following evidence, in pertinent part, in reference to the U.S. entity and foreign entity:

- Evidence of the funding and capitalization of the U.S. company. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the new business in exchange for ownership, including business bank statements with deposits clearly marked in July 2001 for the purchase of the stock. A copy of 1120 tax return for 2001 for the U.S. business.
- Evidence that the foreign employer is currently engaged in business operations. Submit evidence of business conducted, such as invoices, bills of sale, product brochures of goods sold or produced by the company, check register, statement of cash flows, and insurance policies: customs records.

On June 14, 2002, the petitioner responded to the director's request for evidence. Counsel for the petitioner reminded the director that the U.S. company was a "new office" and had been functioning for less than a year when the petition was filed. Counsel stated "[t]he corporation has been doing business in the United States for less than one (1) year and the corporate tax return is not due as of yet and, therefore, one has not been filed with the IRS." The AAO notes that on the Form I-129 Supplement L the petitioner stated that the alien is not coming to the United States to open a new office and that this statement could be the cause of some confusion.

Counsel stated the petitioner submitted evidence of deposits pertaining to the U.S. business. The petitioner submitted a copy of a certificate of deposit (CD) dated August 9, 2001 for the personal account of the beneficiary for the amount of \$10,000. Additionally, the interest instructions of the CD indicated that the funds must be reinvested in another CD at the time of maturity. There is a copy of a debit charge to the beneficiary's personal bank account to transfer \$5,000 to the petitioner on August 9, 2001. The petitioner also submitted financial statements for the U.S. company that were not audited or reviewed by accountants. Also, the accountants who prepared the financial statements disclosed "[m]anagement has elected to omit substantially all of the disclosures ordinarily included in financial statements prepared on the income tax basis of accounting." The director determined that the evidence was not persuasive and did not show the size of the U.S. investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the U.S.

On appeal, counsel states that sufficient supporting evidence was submitted with the initial petition to demonstrate that U.S. operation will support, within a year of the approval, an executive or managerial position. In reference to the regulation requiring information regarding the size of the United States investment, counsel, in a footnote, generally refers the AAO to the evidence submitted to the response to the request for evidence provided on June 14, 2002. The AAO will assume counsel is referring to the deposit slip submitted in

response to the request for evidence that is discussed above. However, this deposit slip does not demonstrate the size of the U.S. investment beyond the \$5,000 debit to the beneficiary's account. Additionally, counsel states in a footnote in his appellate brief that "we submitted a financial statement that reflects the expenditures of the business operation of the U.S. company that clearly shows the petitioner's ability to support General Manager position." On appeal, the petitioner submits a financial statement indicating that the petitioner has spent in excess of \$41,500 to operate the U.S. business site. On appeal, the petitioner also submits copies of its checking account statement dated from April 30, 2002 to June 2002 with an average investable balance of \$9,078.93. Evidence of the petitioner's checking account and its balance was not provided in the petitioner's initial petition or in its response to the director's request for evidence of the funding and capitalization of the new office.

In reference to the foreign entity's ability to remunerate the beneficiary, on appeal, counsel refers the AAO to the evidence submitted by the petitioner in response to the director's request for evidence. The petitioner had submitted documents containing the company's name. These documents were in Spanish and had not been translated, contrary to the requirements of 8 C.F.R. §103.2(b)(3). Therefore, based on the evidence provided, it is impossible to determine if the foreign entity has the financial ability to remunerate the beneficiary. Upon review of the record of the proceeding, the petitioner has not provided the requested evidence showing 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. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petitioner has not demonstrated that U.S. operation will support, within a year of the approval, an executive or managerial position and the appeal must be dismissed.

Although the appeal will be dismissed, it must be noted that the director based her decision in part on an improper standard. In her decision the director stated "[t]he evidence is not persuasive given the [beneficiary's] stake in the US company and the lack of other supporting evidence, that the foreign company had made a sizeable investment in the success of the US business." This comment is inappropriate. The director should not hold a petitioner to her undefined assessment of the "beneficiary's stake" or "sizeable investment." The regulations at 8 C.F.R. § 214.2(l)(3)(v)(C)(2) require supporting information regarding "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." For this reason, the director's decision will be withdrawn in part as it relates to the director's incorrect standard of "sizeable investment".

Additionally, the director incorrectly concluded that the U.S. and foreign business did not have a qualifying relationship because the evidence did not establish that the U.S. company is doing business and the petitioner did not establish that the beneficiary has been and would continue to be acting in a primarily managerial or executive capacity. The director has applied the incorrect regulations. The evidence clearly shows that the petitioner is a "new office" and has been operating for less than a year and does not need to establish that is doing business. For this reason, the director's decision will be withdrawn in part as it relates to the director's conclusion that the U.S. company is not doing business and the petitioner did not establish that the beneficiary has been and would continue to be acting in a primarily managerial or executive capacity.

Based on the record of the proceeding the petitioner had not established that the beneficiary's services are to be used for a temporary period and did not submit evidence that the beneficiary will be transferred to an assignment abroad upon completion of the temporary services in the United States. Also, the petitioner did not submit persuasive evidence that sufficient physical premises had been obtained to house the new office. Finally, the

petitioner did not submit evidence that showed that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position because the petitioner did not submit evidence of the investment in the U.S company and the ability of the foreign entity to remunerate the beneficiary. Therefore, the appeal will be dismissed.

The AAO notes that the petitioner is also appealing the denial of the change of status. There is no appeal from a denial of an application to change status. 8 C.F.R. § 248.3(g).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.