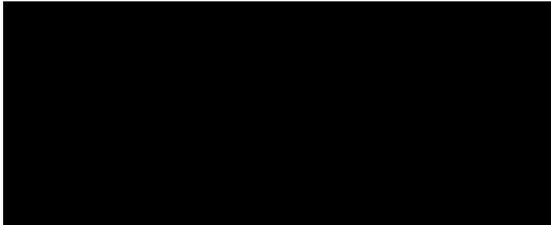




U.S. Citizenship  
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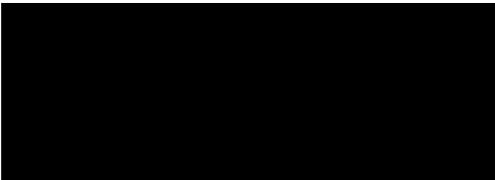


FILE: WAC 98 056 51710 Office: CALIFORNIA SERVICE CENTER Date: **OCT 25 2004**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

identifying data deleted to  
prevent [redacted] granted  
invasion of personal privacy

**PUBLIC COPY**

**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 filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that is engaged in the transportation of freight cargo in the United States, and the export of consumer goods to Russia. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Vladivostok, Russia. The petitioner now seeks to employ the beneficiary as its vice-president for three years.

The director denied the petition concluding that: (1) a qualifying relationship did not exist between the foreign and United States entities; (2) the beneficiary would not be employed in a managerial or executive position in the United States; (3) the petitioning organization is not engaged in regular, systematic, and continuous business; (4) the petitioner's current financial status is insufficient to remunerate the beneficiary; (5) the beneficiary entered the United States on a frivolous B-1/B-2 visa, in which he willfully misrepresented and failed to fully disclose his intent to remain in the United States; and, (6) the petitioner failed to provide evidence that the beneficiary, as a major stockholder of the U.S. entity, will be employed temporarily in the United States.

Counsel for the petitioner filed a motion to reopen and reconsider. The director declined to treat the appeal as a motion, and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the petition was denied in error, as the petitioner satisfied each requirement set forth in the applicable statutes and regulations. Counsel submits a brief in support of his request to approve the petition.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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) further states that an individual petition filed on Form I-129 shall be accompanied by:

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

training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue in this proceeding is whether a qualifying relationship exists between the foreign and United States entities as required in the Act at section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The pertinent regulations at 8 C.F.R. § 214.2(l)(ii) define the term “qualifying organization” and related terms as follows:

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term “qualifying organization” and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien’s stay in the United States as an intracompany transferee; and,
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

\* \* \*

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner stated on the petition that the United States entity is wholly owned by the beneficiary's foreign employer, thereby establishing a parent/subsidiary relationship. In the attached documents, the petitioner submitted a copy of a stock certificate, in which the beneficiary's foreign employer was named as the holder of 5,000 shares of the U.S. corporation's capital stock. The petitioner also provided a copy of a cancelled stock certificate indicating the transfer of 5,000 shares from the previous owner to the beneficiary's foreign employer. Additionally, the petitioner submitted a letter of resignation from the previous director of the U.S. company, a written resolution by the petitioner's current director electing new officers for the corporation, and an election filed with the State of California indicating the corporation's new directors and officers.

In a request for evidence, the director asked that the petitioner submit a Notice of Transaction, evidencing payment by the beneficiary's foreign employer for the stock ownership. The director noted that evidence may include wire transfers or canceled checks. The director also stated that the documentation must clearly indicate the originator of the amounts deposited or wired.<sup>1</sup>

The director indicated in his decision that the petitioner submitted bank statements, financial records, and a purchase/sell contract as evidence of the parent/subsidiary relationship between the two entities. The director stated that while the financial records indicated that large sums of money had been transferred from several overseas sources into the U.S. entity's bank account, the petitioner failed to establish that the foreign employer contributed the "initial start up capital." Consequently, the director determined that the petitioner had not demonstrated that the petitioning organization is a subsidiary of the foreign entity.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) is mistaken in concluding that the requisite relationship does not exist between the foreign and U.S. entities. Counsel explains that the United States business was established on November 2, 1993 by a sole proprietor, who owned all 5,000 shares of issued stock in the company. Counsel states that on July 29, 1997, the sole shareholder sold his entire interest in the petitioning organization to the beneficiary's foreign employer for a purchase price of \$5,000.00. Counsel contends that the foreign employer's ownership is evidenced by the previous shareholder's canceled stock certificate and the reissued stock certificate identifying the foreign employer as the holder of 5,000 shares of capital stock in the U.S. entity.

On review, while the AAO acknowledges that the petitioner submitted a stock certificate reflecting the foreign company as a holder of 5,000 shares of capital stock, this documentation, by itself, is not sufficient to establish the claimed parent-sub subsidiary relationship. The petitioner stated that the common stock was sold at a value of \$5,000.00. However, the petitioner's balance sheet for the period of September 1998 reflects a

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<sup>1</sup> It is unclear from the record whether the petitioner responded to the director's request for additional evidence. CIS electronic records indicate that the petitioner responded to the request on March 6, 1998. Furthermore, the director makes reference in his decision to exhibits A through S submitted by the petitioner. As the record does not contain documentation specifically labeled exhibits A through S, the AAO cannot determine whether the director's mention of the exhibits is an error. The AAO will defer to the director's decision in determining which documents the petitioner provided in response to the director's request.

common stock value of \$7,000.00. Additionally, as correctly noted by the director, the petitioner failed to submit any evidence that the beneficiary's foreign employer actually transferred funds to the U.S. entity as consideration for its ownership of the stock. The director specifically requested that the beneficiary provide evidence, including wire transfers or canceled checks, of the foreign company's payment. 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). Furthermore, 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). Consequently, absent additional evidence, the AAO cannot conclude that the two entities possess the requisite qualifying relationship.

The second issue in this proceeding is whether the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

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.

In a letter attached to the petition, dated December 10, 1997, the petitioner's corporate secretary stated that the beneficiary, as vice-president, would establish the U.S. business, and perform the following job duties:

oversee the hiring of new personnel, corporate training, supervision and staffing assignments for the company. He will conduct annual performance evaluations of the management staff, and all heads of departments, and will supervise the activities of the various managerial personnel and their respective staffs. In addition, [the beneficiary] will negotiate all business contracts with corporate suppliers in order to establish the new operation. In the position of Vice President, [the beneficiary] will possess discretionary decision-making powers and will receive general supervision from the parent company and corporate shareholders.

The petitioner submitted an organizational chart for the U.S. corporation, in which the beneficiary's sole subordinate employee is identified as a general manager, who oversees the following departments: marketing, administration, construction/materials/purchasing, imports, and exports. The petitioner indicated on its petition that the U.S. company currently has six employees, although the petitioner has not specifically identified their names or job positions.

In a request for evidence issued on February 6, 1998, the director asked that the petitioner provide an additional organizational chart, as the previously submitted chart did not sufficiently identify its managerial hierarchy and staffing levels. The director requested that the organizational chart include the following information: (1) the names of all executives, managers, supervisors, and the beneficiary's relationship to each; (2) the number of employees within each department; and (3) the existing employees under the beneficiary's supervision, including their names, job titles, and a brief job description.

As previously noted, it is unclear which evidence in the record was submitted in response to the director's request for evidence. Therefore, the AAO will refer to the director's decision to determine the additional evidence submitted by the petitioner.

The director noted in his decision that the record is not clear which positions each of the six employees of the petitioning organization holds. While the beneficiary is identified as the "number two (2)" employee, the director states that there is no evidence that other employees will relieve the beneficiary from performing the services of the U.S. company. The director explained that his decision was not based on the number of employees in the organization, but rather on "the reality of duties to be performed by the beneficiary." The director determined that, according to the documentation provided, the beneficiary would not be supervising and controlling the work of other supervisory, professional or managerial employees. The director further noted that Exhibits A through S, which are assumedly documents submitted in response to the director's request for additional evidence, are not sufficient in demonstrating the beneficiary's managerial or executive responsibilities, as the petitioner had simply restated CIS' definitions of manager and executive. The director, therefore, denied the petition.

On appeal, counsel asserts that the beneficiary would be employed in an executive position in the U.S. entity. Counsel provides the following job description for the beneficiary:

In his capacity as vice president, the beneficiary would establish the U.S. entity's business and financial goals, i.e., to make the business successful and profitable. He would direct and oversee the company's business operations. He would have authority to approve the hiring of all executives and managers, and oversee, direct and evaluate the performance of all executives and managers who, in turn, supervise the general work force. He would coordinate the entity's various departments. He would establish management's responsibilities, long-range and organizational goals, and operating procedures. He would delegate the authority to direct the day-to-day activities of all departments to the lesser executives and managers responsible for implementing such goals, policies and standards. He would insure that the company operates on a sound financial basis by reviewing reports of costs, operations, forecast data, and financial statements to monitor the progress in attaining company objectives. He would evaluate company finances and direct future financial planning. He would negotiate extended lines of credit from banks and financial institutions to increase the entity's purchasing power. He would approve and/or ratify contracts, such as lease agreements, sales and purchase agreements, etc., negotiated by lesser executives and managers. He would develop and present to the president/CEO the annual budget and projected income statement. He would decide when and in what manner the U.S. entity would expand business operations, purchase major assets, such as truck-tractors, trailers, etc. He would develop marketing and advertising expansion plans, to insure that the company continues to grow and increase its sales and profits. As to all such duties and responsibilities, [the beneficiary] would exercise extremely broad discretionary powers.

With regard to the company's organizational structure, counsel states that the petitioner presently employs thirty full-time employees and ten independent contractors. Counsel notes that the petitioner's employees consist of: a traffic manager, export transportation manager, office manager, safety manager, traffic dispatcher, bookkeeping/payroll clerk, secretary, and twenty-six truck drivers, who report to the safety manager. Counsel also provides jobs descriptions for employees he refers to as a domestic transportation director, an export director, and an operations manager. Counsel states that these three employees would report directly to the beneficiary.

On review, the AAO cannot conclude that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. 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 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.

The record of proceeding before the director at the time of his review does not establish whether the beneficiary would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Counsel for the petitioner stated in an undated memorandum of law accompanying the petition that the beneficiary qualifies as "an Executive and/or Manager of [the petitioning organization]." Additionally, in a second appended letter, the petitioner noted that the beneficiary has been employed "as an executive by [the] parent company," and that it anticipates

“needing [the beneficiary’s] services in the U.S. in a similar management capacity.” Both counsel and the petitioner appear to use the terms manager and executive interchangeably. A petitioner may not claim to employ the beneficiary as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. Neither the petitioner nor counsel has satisfied this requirement.

As required in the regulations, the petitioner must also submit a detailed description of the executive or managerial services to be performed by the beneficiary. *See* 8 C.F.R. § 214.2(I)(3)(ii). The job description submitted by the petitioner fails to adequately explain the beneficiary’s employment as a manager or executive. The petitioner stated that the beneficiary would be responsible for hiring and training new personnel, conducting annual performance evaluations, supervising management activities, and negotiating business contracts. Although requested by the director, the petitioner did not provide any additional information explaining the “management staff” referred to in the beneficiary’s job description, or which job duties the management will perform, and the beneficiary will likewise supervise. Specifics are 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. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.*

It is also unclear from both the petitioner’s letter and the organizational chart whether the petitioning organization presently employs the above-referenced managers and subordinate employees whom the beneficiary will supervise. Again, although requested by the director, the record does not contain evidence that the petitioner submitted an additional organizational chart describing the departments of the petitioning organization, or the beneficiary’s subordinates, including their names, job titles, and job descriptions. Additionally, the petitioner failed to provide employee records or employer quarterly tax returns evidencing the existence of any other employees. 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). While counsel submitted a more complete description of the organizational hierarchy on appeal, this information was available to the petitioner at the time of its response to the director’s request. Therefore, it will not be considered. *Matter of Soriano*, 19 I&N Dec. at 764. If the petitioner does not presently employ the individuals in the positions identified above, it can only be assumed that the beneficiary is performing a portion of the non-qualifying duties of the organization, and therefore, is not employed in a primarily managerial or executive capacity. 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 AAO will next consider whether the petitioning organization is engaged in regular, systematic and continuous business in the United States.

The regulation at 8 C.F.R. § 214.2(I)(1)(ii)(H) defines “doing business” as:

The regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner submitted evidence, including the Certificate of Incorporation and Articles of Incorporation, demonstrating that the petitioning organization was established on November 2, 1993. The petitioner also provided the following documentation as evidence that the U.S. company has been doing business in the United States since its inception: (1) 1994 federal U.S. Corporation Income Tax Return; (2) 1994 California Corporation Franchise or Income Tax Return; (3) bank statements from December 1996 through August 1997; and, (4) copies of the company's cash receipts journal for the years 1995 through 1997.

The petitioner also explained that on July 29, 1997, the beneficiary's foreign employer purchased the petitioning organization in order "to expand its business into the U.S. and develop a closer relationship with many if [sic] its current suppliers and customers." The petitioner submitted a copy of the previous stockholder's canceled stock certificate, a reissued stock certificate identifying the foreign company as a stockholder, and an election of new directors and officers.

The director subsequently requested the following additional documentation: (1) original bank statements from the date of establishment to the present; (2) evidence of all assets that have been purchased for use in the U.S. business; (3) proof of a license to conduct business in the United States; (4) evidence that the petitioner has sufficient working capital to engage in its current business; (5) evidence that sufficient physical premises for the business have been secured, including the phone number and address of the lessor, and an official zoning map of the site; (6) photographs of the business, including the inside and outside premises; (7) copies of corporate financial documents, including balance sheets and statements of income and expenses; (8) copies of tax forms 941 and DE-6, and the petitioner's payroll summary; (9) the most recent certified U.S. Corporation Tax Return; and (10) customs forms 7525-V and 7513.

While the record contains several payment orders and bank statements it is unclear whether any additional evidence was submitted in response to the director's request for evidence. The record is devoid of any of the above-named documents requested by the director.

The director, in his decision, determined that "the evidence presented indicates the subsidiary functions only in the capacity of a U.S. agent, facilitating goods abroad." The director noted that the "subsidiary may exist in name," but it does not appear that it has been engaged in the regular, systematic, and continuous provision of goods and services in the United States. However, the director also stated that CIS "respectfully and strongly disagrees with the petitioner, as the evidence in this petition has established that the petitioner has been very actively engaged in business activity."

On appeal, counsel asserts that the U.S. entity is engaged in domestic intrastate and interstate trucking, and does not merely facilitate the purchase and transfer of goods abroad. Counsel submits additional evidence supporting the assertion, such as newspaper advertisements for truck drivers and dispatchers, forms DE-6 quarterly wage reports for the quarters ending December 31, 1997 and June 30, 1998, contracts of sales and certificates of title for company vehicles, bank statements from November 1997 through September 1998, a rental agreement, and a copy of an audit conducted by the State of California.

On review, the petitioner failed to submit evidence specifically requested by the director and now submits it on appeal. 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. Therefore, as noted previously, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. at 764. The appeal will be adjudicated based on the record of proceeding before the director.

The record of proceeding before the director at the time of his review does not sufficiently establish that the petitioning organization has been doing business in the United States as an “international transportation [sic] and trade company.” The petitioner claimed that the U.S. corporation would operate as a “freight forwarding subsidiary in the U.S. to compliment [sic] its international transportation network in Europe.” In addition to bank statements and a cash receipts and disbursements ledger, the petitioner submitted the petitioning organization’s 1994 U.S. Corporation Income Tax Return as evidence of doing business in the United States. The corporate tax return, however, is three years old, and identifies the U.S. company as a purchasing agent of office products, rather than a freight forwarding company. In addition, while the cash receipts and disbursements journal contains entries for cash received from various invoices, and expenses paid for rent, electricity and telephone, the record does not demonstrate how the company is operating. As the petitioner failed to submit additional evidence specifically requested by the director, including licenses, financial statements, DE-6 quarterly wage reports, and a more recent corporate tax return, the AAO cannot conclude that the petitioning organization has been doing business as a transportation and trade company in the United States. 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. at 193. 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).

The next issue in this proceeding is whether the petitioner sufficiently demonstrated the financial status of the U.S. entity, and its ability to remunerate the beneficiary.

The director stated in his decision that the petitioner’s financial status is unclear, as the petitioner failed to provide requested documentation, such as the foreign company’s balance sheet, statement of income and expenses, and bank statements for the last twelve months. The director further noted that the bank documents and financial records presently in the record do not identify the “initial start up capital” provided by the beneficiary’s foreign employer.

On appeal, counsel asserts that the petitioner presented persuasive evidence of its “sound” financial status, and its ability to remunerate the beneficiary. Counsel states that the foreign entity contributed more than \$750,000 to the initial funding of the petitioning organization. Counsel further contends that the petitioner’s ability to pay the beneficiary’s salary of \$40,000 is evidenced by the company’s financial statements and payroll records, as well as the fact that the company is “actively doing business.”

On review, the record is insufficient to establish the financial status of the U.S. or foreign entities. First, the 1994 federal corporate tax return submitted by the petitioner reflects the financial status of the corporation three years prior to it being purchased by the beneficiary’s foreign employer, and therefore, fails to provide the organization’s current financial status. Second, the corporate tax return reflects a loss in 1994 of approximately \$122,000, thereby establishing that the organization is financially deficient. Additionally, a bank statement dated August 7, 1997, approximately one week after the beneficiary’s foreign employer purchased the U.S. corporation, reflects a combined checking and savings account balance of \$2,136.93. Furthermore, while the petitioner stated in its letter attached to the petition that financial statements pertaining to the beneficiary’s foreign employer were submitted, a review of the record fails to reveal such documentation. Therefore, the record fails to establish the size of the U.S. and foreign businesses.

Moreover, counsel asserts on appeal that the petitioning organization is financially “sound,” as the foreign company contributed more than \$750,000 to the initial funding of the entity. Counsel also submits a summary of bank statements from November 1997 through September 1998; however, the statements do not reflect a transfer of capital from the beneficiary’s foreign employer to the U.S. entity. Again, as this information, as well as other financial documentation, was previously requested by the director, it will not be considered on appeal. *Matter of Soriano*, 19 I&N Dec. at 764. In addition, 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).

Lastly, the AAO will address the issue of whether the petitioner provided evidence that the proposed position in the U.S. entity was temporary, and that following completion of the assignment the beneficiary would be transferred abroad.

The regulation at 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 stated in his decision that the beneficiary is a 50% owner of both the foreign and petitioning entities. The director determined that the petitioner failed to submit evidence that the beneficiary, as a majority shareholder, would be employed temporarily in the United States.

On appeal, counsel asserts that the director is mistaken that the petitioner must submit evidence that the beneficiary’s assignment in the United States is temporary. Counsel contends that pursuant to the Immigration Act of 1990 “there exists no requirement, either in law or regulation, that an applicant for an L visa or L status be required to maintain a residence outside the United States to which he or she must intend to return at the conclusion of his or her stay in the U.S.” Counsel further asserts that the beneficiary’s wife and child presently reside in Russia, and “[CIS] should accept the good faith representations of the parties that the proposed position and duties are temporary in nature.”

On review, counsel fails to acknowledge the above-cited regulation. 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 Isovich*, 18 I&N Dec. 361 (Comm. 1982). 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 that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In the present matter, the director concluded that the beneficiary is a majority shareholder in both the foreign and U.S. entities. Counsel does not assert otherwise on appeal. However, on review, there is insufficient evidence to ascertain whether the beneficiary is a majority shareholder in either corporation. As the record is deficient in establishing the ownership of either organization, this issue need not be further addressed.

Further, counsel asserts on appeal that the petitioner's former counsel, who prepared and filed the petition, "failed to provide the [CIS Service Center] with a properly prepared petition or with a cover letter which clearly explained how and why the beneficiary was entitled to and deserved of the status of an intracompany transferee." Counsel further requests that the petitioner not be penalized for prior counsel's "very serious failings, oversights, omissions and [ ] carelessness." Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). As this documentation has not been submitted with the appeal, this issue need not be considered.

For the foregoing reasons, the petition cannot be approved.

The AAO notes for the record that the director found that the beneficiary willfully misrepresented and intentionally failed to make a full disclosure on his B-1/B-2 visa application.

Section 101(a)(15)(ii)(B) of the Act, 8 U.S.C. § 1101(a)(15)(ii)(B) defines a nonimmigrant seeking classification as a B-1 visitor as:

an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.

In the present matter, at the time of filing the L-1 petition, the beneficiary was in the United States as a nonimmigrant visitor for business or pleasure. The beneficiary entered the U.S. on July 23, 1997; his nonimmigrant status expired on January 22, 1998. On December 19, 1997, the petitioner petitioned to change the beneficiary's status to a nonimmigrant intracompany transferee.

In his decision, the director stated that the beneficiary had a preconceived "intent of misrepresenting a material fact," as the beneficiary entered the United States fifteen days after the foreign company purchased the petitioning organization. The director stated that the true intent of the beneficiary was to evade "the L-1 inter transferee process abroad by filing a frivolous B-2 Visa application."

On appeal, counsel denies that the beneficiary misrepresented his true intention for entering the United States. Counsel states that the beneficiary "advised the immigration inspector that he was a visitor for business," rather than a visitor for pleasure. Counsel further notes that the beneficiary entered the United States "to promote international trade and commerce," and that he maintains a residence with his wife and child in Russia. Counsel asserts that the beneficiary was therefore "engaged in 'business' within the meaning of section 101(a)(15)(B) of the Act because, at the time of his entry, he intended to perform a necessary incident to international trade and commerce."

There is no appeal from the director's determination on the beneficiary's maintenance of status. *See* 8 C.F.R. § 214.1(c)(5). However, the AAO notes for the record that the U.S. Department of State Foreign Affairs Manual specifically excludes from B-1 classification any alien traveling to the United States to engage in a commercial transaction that involves that alien's gainful employment in the U.S. *See* 9 FAM § 41.31 N5. Additionally, a nonimmigrant in B-1 status may not receive a salary from a U.S. source for services rendered by the alien in the United States. *See* 9 FAM § 41.31 N3.4.

Counsel asserts on appeal that the beneficiary did not have a "preconceived intent" of employment in the petitioning organization because the beneficiary was in the United States for five months before a petition requesting a change of status was filed on his behalf. The record, however, demonstrates otherwise. A "Written Consent of the Sole Directors," dated less than one month after the beneficiary entered the United States, identifies the beneficiary as both a director and an officer of the U.S. company. The document further states duties that the beneficiary is authorized to perform on behalf of the corporation, and indicates that a salary and bonus will be paid to the beneficiary as an officer. A similar form naming the beneficiary as an officer of the company, and identifying the beneficiary's address as a U.S. residence, was filed with the State of California on August 20, 1997. It is difficult to believe that the beneficiary, less than one month prior to these documents being executed, did not possess the intent when he entered the United States to remain as an employee of the petitioning organization. Additionally, the beneficiary is in violation of his B-1 status if, as noted in the above-mentioned "written consent" executed by the U.S. company's directors, he received a salary from the petitioner for his services as an officer. As there is no appeal from the director's determination on this matter, the decision of the director will not be disturbed as it relates to this question.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner asserted that the beneficiary functioned as the foreign employer's vice-director, and directed operations of half of the company's divisions and subsidiaries. Yet the petitioner did not provide documentation of ownership of the named subsidiaries, or employee records evidencing the foreign company's employment of the beneficiary's subordinates. 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. at 193. Additionally, the petitioner asserted that the beneficiary has been employed in his position abroad from 1994 until the present, which is assumedly the date of the petition, December 19, 1997. The record, however, indicates that the beneficiary has been in the United States since July 1997, and therefore, is not currently working abroad. As the petition will be dismissed on other grounds, this issue need not be considered further.

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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.