



U.S. Citizenship
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File: SRC 05 252 53303

Office: TEXAS SERVICE CENTER

Date: NOV 18 2005

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)

IN 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

DISCUSSION: The director, Texas Service Center, denied the petition for a nonimmigrant visa and certified the matter to the Administrative Appeals Office (AAO) for review. The AAO will affirm the director's decision.

The petitioner filed this nonimmigrant petition seeking, for the second time, to employ its president and corporate secretary in a "new office" as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Under the governing regulations at 8 C.F.R. § 214.2(l)(3)(v), a U.S. petitioner that has been doing business for less than one year may petition for a manager or executive if it can be expected that the new office will, within one year, support a managerial or executive position. After one year, the regulations require the petitioner to file for an extension with supporting documentation evidencing that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

The petitioner was incorporated on February 26, 2004 under the laws of the State of Texas and claims to be engaged in the manufacture of hydraulic and pneumatic seals, custom moldings, and rubber-to-metal bondings. The petitioner is the subsidiary of [REDACTED] Ltd., located in Ashington, United Kingdom.

The director approved the first petition (SRC 04 204 52238) for a one-year period, August 15, 2004 to August 14, 2005, to allow the beneficiary to open a "new office" in the United States. The director denied the subsequently filed extension petition (SRC 05 199 50366) due to insufficient staffing. The petitioner now seeks approval of a second "new office" petition (SRC 05 252 53303) to permit the beneficiary to reenter the United States in L-1A status for one additional year.

Upon initial review of this second new office petition, the director sent the petitioner a request for additional evidence on September 26, 2005. The director noted that, as the beneficiary had already been granted a one-year period of stay under a new office petition, he was ineligible for another new office petition and, therefore, the petition would be processed as if filed by an established organization. In addition, the director requested additional evidence. In response, counsel for the petitioner argued that the instant petition should be processed as a new office petition. In addition, counsel submitted additional evidence in response to the director's request.

The director treated the petition as if it had been filed by an established organization and denied the petition. The director concluded that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On certification, counsel for the petitioner asserts that: (1) the director required a higher burden of proof than preponderance of the evidence, and (2) the director incorrectly determined that the petitioner did not qualify as a new office. No additional evidence was submitted in support of these assertions.

Upon review and for the reasons discussed herein, counsel's assertions are not persuasive. The petitioner may not be granted a second "new office" L-1A visa approval with an additional one-year validity period.

In general, the statute allows nonimmigrant L-1A classification for an alien that is being transferred from an overseas employer temporarily to the United States to work for a related company in a managerial or executive capacity. Section 101(a)(15)(L) of the Act. By statute, eligibility for the classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons who perform the management activities involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. *See* section 101(a)(44)(A)(iv) of the Act; *see also* 52 Fed. Reg. 5738, 5740 (February 26, 1987) (available at 1987 WL 127799).

Recognizing that a manager or executive may not immediately engage in the full scope of their duties, the regulations provide for a lower standard when a petitioner is a new office. According to 8 C.F.R. § 214.2(l)(1)(ii)(F), a "new office" is defined as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year." The term "doing business" is defined 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." 8 C.F.R. § 214.2(l)(1)(ii)(H).

The regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the beneficiary is coming to the United States as a manager or executive to open or to be employed in a "new office," 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that, after one year, a visa petition which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

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

On certification, counsel does not contest the director's conclusion that the beneficiary will not be employed in a primarily managerial or executive capacity. Instead, counsel asserts that the petitioner should be granted a second one-year period to open the new office. The petitioner concedes that it did not develop in the first year to a point that it would support a managerial or executive employee and that its petition to extend the validity of the beneficiary's L-1 was denied because "the staffing levels of the company did not support a managerial function." In support of the request for a second new office period, the petitioner has submitted a lengthy statement dated September 6, 2005, explaining that the beneficiary was unable to get the U.S. company operational during its one-year "new office" validity period due to organizational delays and product testing requirements that are normal in the petitioner's industry. Finally, counsel asserts that the denial will create a negative economic impact, "shutting down legitimate foreign investment [United States], destroying U.S. jobs and putting up insurmountable barriers to legitimate foreign investment in the United States."

Despite counsel assertions, the petitioner may not be granted a second "new office" L-1A visa approval. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. By allowing multiple petitions under the more lenient standard, CIS would in effect allow foreign entities to create under-funded, under-staffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(1)(14)(ii). As previously noted, the petitioner's extension petition was denied.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by CIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United

States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that "business entities just starting up seldom have a large staff." *Id.* Despite the fact that an alien engaged in the start up of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(I)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, CIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(I)(14)(ii)(B).

Upon review of the current petition, it is apparent that the petitioner was not prepared to commence doing business upon approval of its initial new office petition. The petitioner stated in the current petition that it was not until November 2004, four months after it filed the initial new office petition, that the beneficiary "was given board approval to find warehouse and office facilities in the area to commence trading on a professional basis." The petitioner further stated that it was not until January 2005, approximately six months after it filed the first petition, that the beneficiary "signed the lease for Suite 130, West Loop North [the petitioner's corporate offices] and took possession of the keys." Although the petitioner claims that the beneficiary originally set up an office in the Heights of Houston, Texas, this location does not appear to have been sufficient for the petitioner to actually commence doing business. During the first year of operations, the beneficiary appears to have primarily acted as an agent of the foreign entity, "setting up banking facilities, insurance, CPA, and looking for sales staff" and conducting feasibility and marketing studies. *See* 8 C.F.R.

§ 214.2(l)(1)(ii)(H) (noting that the "mere presence of an agent" is not sufficient to show that a company is doing business).

As previously noted, 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, it is not clear whether the petitioner did not comply with this requirement when it filed its first petition, misrepresented that they had complied, or whether the director committed gross error in approving the initial petition without evidence that the petitioner had acquired sufficient physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

Contrary to the claims of counsel, the denial of a second new office petition will not necessarily "have the effect of shutting down legitimate foreign investment in the [United States], destroying U.S. jobs and putting up insurmountable barriers to legitimate foreign investment in the United States." An L-1A petition deals solely with the entry and employment authorization of one non-U.S. worker and does not decide a corporation's right to invest and do business in the United States. If a petition is denied, it simply means the petitioner cannot employ the beneficiary under the nonimmigrant classification requested. The petitioner can still do business in the United States and hire any U.S. worker at will.

Additionally, the petitioner may still seek the beneficiary's entry into the United States under a different employment-based immigrant or nonimmigrant classification. In reviewing Congressional intent as part of the rulemaking process, the legacy INS noted that the L-1 category was created by Congress "to help eliminate problems faced by international companies having offices abroad in transferring key personnel freely within the organization." 52 Fed. Reg. at 5739. However, the INS also noted that many aliens that do not fit under the L-1 category, such as self-employed investors, may be classified under a different visa: "Congress has provided several other nonimmigrant classifications which permit such persons (who often characterize themselves as "investors") to come to the United States to oversee their investments, including the B-1 (temporary visitor for business), E (treaty trader or investor), and the H (temporary worker) classifications." *Id.*

If any one foreign employee is critical to launching a new company in the United States, the immigration laws of the United States already provide a number of other means for an employee to enter the country for this purpose. Specifically, for certain trade and commerce treaty countries, including the United Kingdom, the E nonimmigrant visa classification is designed to permit foreign investors and those engaged in the international trade of goods and services to enter the country. *See* section 101(a)(15)(E) of the Act, 8 U.S.C. § 1101(a)(15)(E). Moreover, if a petitioner is not immediately ready to begin doing business in the United States, it may seek to send foreign employees to the United States under the B-1 classification. *See* section 101(a)(15)(B)(i) of the Act, 8 U.S.C. § 1101(a)(15)(B); *see also* INS Insp. Field Manual § 15.4(b)(1)(B); 9 FAM § 41.31 Notes.

Finally, contrary to counsel's claims, if a petitioner is unable to meet the requirements to extend an L-1A new office petition, this does not mean that the beneficiary can never be approved again for L-1A classification. While the petitioner may be ineligible for a second new office petition or a new office petition extension

under 8 C.F.R. § 214.2(l)(3)(v)(C) and 8 C.F.R. § 214.2(l)(14), the petitioner may wait until it has been doing business in the United States for more than one year and then file a standard L-1A petition for new employment on behalf of the beneficiary. Under such a petition, however, the petitioner must show that it will employ the beneficiary in a managerial or executive capacity as required under sections 101(a)(44)(A) and (B) of the Act.

In this matter, the petitioner was not prepared to begin doing business in the United States until January 2005, at the earliest, five months after the initial new office petition was approved. This failure on the petitioner's part, while unfortunate, is not a result of some impediment created by the law or regulations. The one-year period was not included in the regulations as a hindrance to new offices. On the contrary, the new office provisions were added to the regulations in 1987 specifically in recognition that it would be impossible for some new offices to immediately employ someone in an executive or managerial capacity as defined in the regulations. *See* 52 Fed. Reg. at 5739-5740. At the same time, the legacy INS stated that it "must concern itself with abuse or the potential for abuse of any visa category" and further noted that "one year is sufficient for any legitimate business to reach the 'doing business' standard." *Id.* Thus, it appears that the petitioner's present exigency is not the result of a restrictive regulation but rather a lack of legal and business planning together with the normal and expected business delays in the petitioner's given industry.

In conclusion, the petitioner may not be granted a second petition under the more lenient "new office" provision.¹ The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of a new office petition to support an executive or managerial position. There is no provision in CIS regulations that allows a petitioning corporation additional petitions under the "new office" regulatory accommodation for managers and executives. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the previously approved L-1 petition. The director properly determined and gave notice to the petitioner that she could only process the petition as an established business and not as a new office, and she properly reviewed whether the beneficiary would be primarily employed in a qualifying managerial or executive capacity.

As previously noted, counsel did not directly challenge the director's finding that the petitioner will not employ the beneficiary in a managerial or executive capacity upon approval of the petition. Instead, counsel claims that the petitioner still qualifies as a new office under the regulations and implies that it is not required

¹ The petitioner filed the instant new office petition while the beneficiary was absent from the United States in what appears to be an attempt to prevent the petition from being considered a new office extension petition. If this were the petitioner's intent, it is noted for the record that it appears to have confused a petition extension with an extension of a beneficiary's stay in the United States. Although both must be requested on the same form, the regulations clearly differentiate between a petition extension and an extension of stay request. *See* 8 C.F.R. § 214.2(l)(15)(i). However, the petitioner cannot acquire a second petition under the more lenient "new office" regulations simply by leaving the country. By regulation, a petitioner may be granted a one-year period for the purpose of opening a new office. Moreover, whether a beneficiary only utilizes his L-1A status for a period of stay of 10 days per month or 30 days per month is irrelevant. The "new office" regulation relates to the visa validity period and not the beneficiary's period of stay.

to establish that the petitioner will support a managerial or executive position until one year from the date the petition is approved.

Although counsel and the petitioner have conceded the point on appeal, the AAO notes that the petitioner has not established that the beneficiary has been and will be primarily employed in a managerial or executive capacity. Section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On review, the petitioner has provided only a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary's duties will include "establish . . . corporate policies and goals," "determine the progress and status of objectives and . . . revise objectives in accordance with current conditions," "direct the formulation of . . . financial planning," and "supervise the development of [the petitioner's] marketing plan." The petitioner did not, however, define the petitioner's policies, goals, and objectives or clarify who actually does the financial planning or who specifically develops the marketing plan. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For instance, the petitioner depicted the beneficiary as being responsible for "oversee[ing] and design[ing] all components for use in the industry," "establish[ing] corporate policies and goals," and "exercis[ing] wide latitude of discretion over the daily operations and activities of [the petitioner]." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner describes the beneficiary as "negotiat[ing] for storage/distribution facilities in the U.S.," "leading the introduction of [the petitioner's] manufacturing process," and "addressing all other operational, financial/payroll and legal issues for the company as needed." As the beneficiary actually negotiates the contracts, is directly involved in the manufacturing process, and is responsible for handling the financial/payroll and legal issues, he appears to be performing tasks necessary to provide a service or product

and these duties will not be considered managerial or executive in nature. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, even though the petitioner claims that the beneficiary directs and manages the petitioner's one business development employee, Ms. [REDACTED] and three contractors, it does not claim to have anyone on its staff to actually perform the financial planning, payroll, and administrative functions. Thus, either the beneficiary himself is performing the financial planning, payroll, and administrative functions or he does not actually manage these functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the financial planning, payroll, and administrative functions, the AAO notes again that 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 Int'l.*, 19 I&N Dec. at 604.

Finally, although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. Besides the petitioner's and counsel's claims that the petitioner has five employees, there is no evidence in the record that the petitioner ever employed anyone other than the beneficiary and one other employee, presumably Ms. [REDACTED]. Specifically, the state quarterly tax returns only indicate that, at most, two persons were employed by the petitioner at any given time. As correctly noted by the director, there is no evidence in the record that the petitioner used the services of any contractors. Therefore, absent any evidence that Ms. [REDACTED] had any subordinate personnel, it cannot be concluded that she qualifies as a supervisory or managerial employee and that the beneficiary is anything more than a first-line supervisor. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

With regard to this determination, however, counsel claims on certification that the director required a higher burden of proof than preponderance of the evidence. Specifically, counsel states that the director "failed to give proper weight to the payroll tax receipts as proper evidence of preliminary staffing activities engaged in by this new office and failed to give proper weight to [the p]etitioner's staffing organizational charts reflecting the use of independent contractors."²

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought. See

² It is noted for the record that the standard of proof should not be confused with the burden of proof. The burden of proving eligibility for the benefit sought remains entirely with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. Additionally, the "preponderance of the evidence" standard does not relieve the petitioner or applicant from satisfying the basic evidentiary requirements set by statute or regulation.

e.g. Matter of Martinez, 21 I&N Dec. 1035, 1036 (BIA 1997) (noting that the petitioner must prove eligibility by a preponderance of evidence in visa petition proceedings); *Matter of Patel*, 19 I&N Dec. 774, 782-3 (BIA 1988) (noting that section 204(a)(2)(A) of the Act requires a higher standard of clear and convincing evidence to rebut the presumption of a fraudulent prior marriage); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965) (finding that the petitioner had not established eligibility by a preponderance of the evidence because the submitted evidence was not credible).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See also U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

As previously stated, the submitted evidence indicates that the petitioner employed, at most, two employees at any given period of time. The claims made in the petitioner's and counsel's statements as well as in the petitioner's organizational chart regarding the three contract personnel remain uncorroborated. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Here, the evidence of record indicates that the petitioner employed only two persons and not five as claimed. Therefore, the petitioner has failed to prove by a preponderance of the evidence that its claims regarding the number of persons employed in the United States is true.

Overall, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, 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). Furthermore, as previously stated, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(1)(3).

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 affirmed. The petition is denied.